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No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1988

WILLIAM PATRICK COUSINS

PETITIONER

V

UNITED STATES OF AMERICA

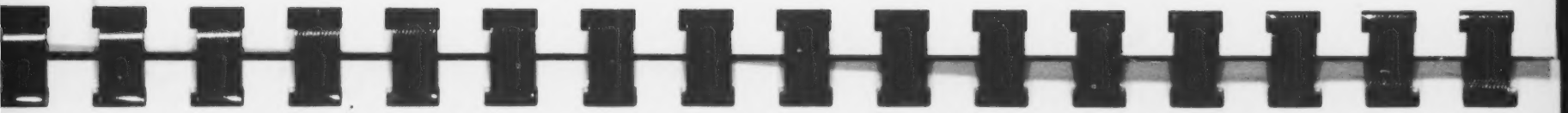
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

WILLIAM PATRICK COUSINS
IN PROPRIA PERSONA
08275-017
P. O. BOX 600
EGLIN A.F.B.
FLORIDA
32542-7606



QUESTION(S) PRESENTED

JURY AND JURY TRIAL/EXTRINSIC--MEDIA ENCOUNTERS, DIRECT PERSONAL ENCOUNTERS THEIR COMPOUND EFFECT ON IMPARTIALITY ... AS TO CONSTITUTIONAL AMEND. VI, AS TO 28 USC FEDERAL RULES OF EVIDENCE RULE 606(b) and 28 U.S.C. FED RULES OF CRIMINAL PROCEDURE RULE 43(a).

1) Where Federal Judge Paul talked (privately, without counsel or Petitioner, or court reporter present) with the jury and told them how to answer his questions in open Court.

2) Where Federal Judge Paul limited the scope of his inquiry so as not to detect the effect of damaging extraneous evidence.

3) Where Federal Judge Paul CREATED a cover up in the face of a rebuttable presumption regarding media and personal juror encounters.

4) Where Federal Judge Paul failed to consider the massive and cumulative media effect compounded with a personal/insider encounter on impartiality.

5) Where the government did nothing... with the shift of their heavy burden to show the rebuttable presumption harmless.

6) Where the Eleventh Circuit ruled in a dis similiar manner from precedents: Supreme Court and Appellate.

COMMUNICATIONS BETWEEN JURORS

COMMUNICATIONS BETWEEN THIRD PARTIES AND JURORS

COMMUNICATIONS BETWEEN COURT AND JURORS

CONCLUSIVENESS OF JUROR'S STATEMENT OF IMPARTIALITY

JURY TAMPERING

PRETRIAL AND DURING TRIAL PUBLICITY

PARADYGM, PARADIGMS NEEDED WHERE 1) INCIDENTS OF JURY MISCONDUCT, TESTIFIED BY JURORS AND 2) INCIDENTS WHICH FURNISH THE BASIS TO SET ASIDE A VERDICT---OVERLAP EXTENSIVELY

PRIMA FACIE INCOMPATABLE WITH THE SIXTH AMENDMENT

DUTY OF THE COURT TO PROTECT THE INTEGRITY OF ITS OWN PROCESSES!...the "INCIDENT" IMPUGNS THE DISINTERESTEDNESS OF THE COURT---CAN ALSO BE VIEWED ON THE TURNING OF SIXTH AMENDMENT VALUES.

WHAT ARE THE PROPER AND ADEQUATE STANDARD GUIDELINES FOR EXTRINSIC MEDIA CONTACT AND DIRECT CONTACT ALLEGED DURING A TRIAL AND BEFORE A TRIAL?

GUIDELINES/STANDARDS, THRESHOLD TESTS AND TRIGGERING. NATURE AND DEPTH OF EVIDENTIARY HEARING?

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Irvin v. Dowd, 366 US 717 (1961)

Mattox v. U.S., 146 US 140 (1892)

Owen v. Duckworth, 727 F.2d 643 (7th Cir. 1984)

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U.S. v. Heller, 785 F.2d 1524 (11th Cir. 1986)

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U.S. v. Marshall, 360 US 310 (1959)

U.S. v. Perkins, 748 F.2d 1519 (11th Cir. 1984)

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U.S. v. Trapnell, 638 F.2d 1016 (1980)

U.S. v. Vasquez, 1979)

U.S. v. Winkle, 587 F.2d 705 (5th Cir. 1979)

U.S. v. Yonn, 702 F.2d 1341 (11th Cir. 1983)

TABLE OF AUTHORITES-continued

Constitution, Statutes and Rule:

U.S. Constitution, Amendment VI

28 U.S.C. Fed. R. of Evid. Rule 606(b)

28 U.S.C. Fed. R. of Crim. Pro. Rule 43

REPORT OF OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit entered its per curiam published opinion affirming the Petitioner's judgement of conviction on April 19, 1988, a copy of which is hereto attached in the Appendix (A-1 through A-22).

The Court of Appeals also denied the Petitioner's petition for rehearing

on June 7th, 1988. A copy of the ORDER is hereto attached in the Appendix (A-23).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is hereby invoked under Title 28, United States Code, Section 1254(1), and also under the rules of the Supreme Court of the United States, Rule 17(1)(a).

The Judgement of the Court of Appeals was entered on April 19, 1988.

A timely petition for rehearing en banc was denied on May 27th, 1988.

CONSTITUTIONAL AMENDMENTS, PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the UnitedStates Constitution provides in pertinent part:

> ...which provides and quarantees that the accused shall enjoy the right to trial by an impartial jury and right to be confronted with the witnesses against him...

28 U.S.C. Federal Rules of Criminal Procedure, Rule 43(a), provides in pertinent part:

> (a) Presence Required. The defendant shall be present at ...every stage of the trial...except as otherwise provided.

28 U.S.C. Federal Rules of Evidence, Rule 606(b), provides in pertinent part:

> (b) Inquiry into the validity of verdict or indictment. Upon an inquiry into the validity of a verdict...may not...mental processes...except that a juror may testify on the question WHETHER extraneous prejudicial information was improperly brought to the jury's attention or WHETHER any outside influence was improperly brought to bear upon any juror.

IN THE

SUPREME COURT OF THE UNITED STATES

1988 TERM

WILLIAM PATRICK COUSINS

PETITIONER

V

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

THE PETITIONER, WILLIAM PATRICK COUSINS, respectfully prays that a Writ of Certiorari be granted to review the judgement of the United States Court of Appeals for the Eleventh Circuit, which was entered on May 27th, 1988.

REASONS AND AGRUMENT FOR GRANT OF WRIT

There are many* and varied* legal propositions involved in the instant case that might be applied, however much they are ambiguously and mixedly stated*. What is desperately needed is a case from the Supreme Court in our land that Judge Paul and many others might have looked to, even though they looked at none, as appears from the record. That case they might have looked for an answer to their new "dilemna" and "media situation" could colloquially be known as the "COUSINS-NEPHEW AND MEDIA CASE." It should be, THE place to look and start to apply the law in a case that has a multiple factual situation and has many of the aspect/facets of legal issues in this ever increasing media case volume in the Nineties. It is timely for the Supreme

Court to speak on the increasing volume of media jury contact (*301 cases cited in this brief and 300 examined by me.)

When jurors know about and have come into contact with extrinsic evidence(s), as in the instant case, "a new trial is required if evidence poses a REASONABLE POSSIBILITY OF PREJUDICE to the defendant." "Prejudice from extrinsic evidence is ASSUMED IN THE FORM OF REBUTTABLE PRESUMPTION, and the government bears a heavy burden of demonstrating that consideration of extrinsic evidence was harmless. "U.S. v. Perkins, 748 F.2d 1519 (11th Cir. 1984)

The Eleventh Circuit held a diametrically opposed view in the instant case from Perkins. And did so with more convincing extrinsic evidence. (See A-1-22). The Eleventh Circuit erred in

coming to the conclusion that "no colorable showing" was presented. The jury sat with Petitioner's nephew in direct view for five days, eight hours each day, in the Petitioner's group and area, (See Diagram A-77 and A-78), with Petitioner's mother. Five or Six jurors observed Petitioner's mother with the Petitioner's nephew in the elevator. The Petitioner's nephew was observed continually conversing with the Petitioner's and other relatives. The nephew has the appearance of a younger brother of the Petitioner. The nephew assumed the jury knew who he was when he conversed with them in the elevator, and the jury did know who the nephew was in their discussion of the nephew's conduct and statements before they made their initial report to Judge Paul, (Diagram A-77, 78).

When the nephew "persisted" in his interrogation of the five to six jurors, in a slow elevator, which takes about seventy seconds to go from the ground floor to the third floor, (a persistent, verbose, and garrulous person, as the nephew was, can speak easily and fluently two hundred plus words in seventy seconds). The nephew was making admissions, against Petitioner's interest as an obvious insider and relative, such as, "HE (referring to Cousins), IS GUILTY!" The jury told the nephew they could not talk about it. But the nephew kept persisting, he said, "He is guilty, isn't he", or "is he guilty?",or "IT IS OVER WITH!", or "They don't have any more." (This was the fifth day of evidence in a seventeen day trial), or "Statements just like that!", or "Words to that effect!" Judge Paul asked no

questions what any of the words or phrases or statements or questions, meant to the jury, the extent of their previous discussions in the jury room, or as the degree, duration or extent of the damaging extrinsic material. He did, however, impose a sentence of three years on the nephew. Judge Paul did ask if they jury felt that the incident was instigated or prompted by either party. Hardly a fair question under the circumstances...a question of "feelings" as to who instigated the damaging extrinsic admissions and material. He did not clarify what was said. Judge Paul, after asking the jury if they had any "feelings" as to which of the parties instigated or prompted the "incident" (He euphemistically glosses admissions from an insider!) asked a second question for which he secured, "NO RESPONSE!" (A-38,

line 16) Jury unable to answer.

THE COURT: Is there anyone at all, now, that thinks that (I guess "that" refers to (?) "feelings" "instigation" or "incident") would influence them one way or another in this case?"

THE JURY: NO RESPONSE. See printed Court of Appeals for the ELEVENTH CIRCUIT opinion COPYRIGHT @ 1988 by WEST PUBLISHING CO. Page 3.

How could they, they jury, forsee into an unwarranted and ill-advised type of question with twelve more days of evidence and then their deliberations?

The Eleventh Circuit thinks the "NO Response" is not a colorable showing. The Eleventh Circuit held, in conflict with the Perkins case, Id., that the evidence brought to the attention of Judge Paul poses no reasonable possibility of prejudice. The Eleventh Circuit held, in

conflict with Perkins, Posner, Sheppard, and many others, in the Table of Authorities. Or, that the admissions (against Petitioner's interest) of the Petitioner's nephew as extrinsic evidence is assumed in the form of rebuttal presumption. Nor, was the government, so the Eleventh Circuit held, in any position to bear the heavy burden, (some cases say almost impossible) of demonstrating that consideration of the evidence was harmless. The Eleventh Circuit held, in conflict with the above fourteen cases: 1) That there was no colorable showing. 2) That the presence of extrinsic material raised no reasonable possibility of prejudice. 3) That there was no assumption of rebuttable presumption. 4) That the government was not to assume the burden of demonstrating the evidence was harmless.

These conflicts and resulting error deprived the Petitioner of a fair and impartial trial and an error of Constitutional magnitude.

The previous statement of law and fact only took into consideration the encounter/incident.

Let us now consider how this "incident" was compounded and enhanced.

1) "Any contact which individual jurors may experience that is beyond evidence presented at trial and that jurors received without knowledge or instruction of trial judge is presumptively invalid."
UNITED STATES v. POSNER
644 F.Supp.885 (S.D. Fla. 1986)

2) Once defendant establishes or court discovers presence of extrinsic material finding its way into jury room, burden is then placed upon Government to negate presumption of prejudice.
UNITED STATES v. POSNER
644 F.Supp.885 (S.D. Fla. 1986)

3) Although Federal Rules of Evidence make it difficult to detect existenceof jury's exposure to outside influences, when court is confronted with unmistakable evidence of juror impropriety, proper course of action is to grant a new trial.

UNITED STATES v. POSNER
644 F.Supp.885 (S.D. Fla. 1986)

After any contact in 1. and presence in 2. and 3. Judge Paul, admonished and orderd the jury for 12 to 15 times at this point in the trial..."NOT TO READ NEWSPAPERS"...Yet a newspaper was found in the jury room, as seen by witnesses carrying it into the jury room, which newspaper was creased and folded, to the article describing the previous days "incident" with all of its damaging admissions and prejudicial material. (See Appendix A-23-73, 79-80)

Again, the following two quotes, clearly indicate conflict and different holdings in similar cases with the instant case in their, Court of Appeals rulings. It is emphatically the province and duty of the judicial department to say what the law is...If two laws

conflict with each other, the courts must decide on the operation of each...This is of the very essence of judicial duty. Marbury v. Madison, 1 Cranch, 1317 (1803).

> Sixth Amendment guarantee of trial by jury requires jury verdict to be based on evidence produced at trial; extrinsic evidence not subject to procedural safeguards of fair trial threatens such constitutional safeguards as defendant's rights of confrontation of cross-examination, and of counsel.
>
> When jurors consider extrinsic evidence, new trial is required if evidence poses reasonable possibility of prejudice to defendant; prejudice from extrinsic evidence is assumed in form of rebuttable presumption, and government bears burden of demonstrating that consideration of evidence was harmless. U.S. v. Perkins, 748 F.2d 1519 (11th Cir. 1984)

Thus, an already bad situation, i.e. the "incident" has been compounded and enhanced by prejudicial presence and contact and triggers the presumptions.

The news clippings and the TV and radio coverage chronicled and charted in A 74-76 caused manifest injustice to the Petitioner as the evidence shows: pervasive saturation, and overpowering animus toward the Petitioner, and so pervaded and saturated the community, as to raise the presumption of prejudice, and to render the community as virtually impossible for a fair trial by an impartial jury drawn from such a community, that jury prejudice, bias, leaning to one side and lack of neutral reason and emotion, that jury prejudice is to be presumed and there is no need to establish the actual confessions and admissions in words from their lips and mouths of the jurors. Such was the situation and the circumstances in the Fall of 1986 in the small town of Gainesville, Florida (Pop. 51,000)

involving a local boy charged with major importations of cocaine and marijuana. Judge Paul secured a, "NO RESPONSE" from the jury in open court after his talk with them out of presence of counsel...what further proof need there be for improper use of power and priviledge and discretion.

> Incidents of extraneous influence which afford grounds for overturning verdict include: 1) exposure of juror to news items, 2) matter pending before jury, consideration by jury of extrarecord facts about case, 3) communication between third parties and jurors where relevant to case to be decided, and pressures of partiality on part of court; first three types of conduct render verdict vulnerable as prima facie incompatible with this amendment while fourth category may also be viewed as turning on values under this amendment, and, in addition, on court's duty to protect integrity of its own processes. Government of Virgin Islands vs Gereau, 523 F.2d 140, (C.A. Virgin Islands, 1975).
>
> If a juror is predictably more likely to find guilt because of some consideration other than the law and the evidence, that juror is not

the evidence, that juror is not "impartial" in the sense required by this amendment and the fundamental fairness of the trial is eroded. Grigsby v. Mabry, 483 F.Supp. 1372, (D.C. Ark.1980).

Proper test for impartiality is whether juror can be fair and impartial regardless of experience, background, preconceived notions, or prior views held. U.S. v. Schullo, 390 F.Supp. 1067, (D.C.Minn.1975).

General test to be applied in determining if jury or any juror is impartial is whether the nature and strength of opinion formed are such as in law necessarily raises the presumption of partiality. Vessels v. Estelle, 376 F.Supp. 1303, (D.C.Tex.1973).

"Impartiality" is not a technical conception but is a state of mind, and for ascertainment of such mental attitude of appropriate indifference, this amendment guaranteeing impartial jury lays down no particular test for procedure and is not chained to any ancient and artificial formula. Dennis v. U.S., (1950) 70 S.Ct. 519, 339 U.S. 162, 94

The trial court via Judge Paul admitted to a new experience of the media incident and the jury encounter incident.

He stated, "I am plowing new ground too!" (A-42) Referring to his euphemistic "incident". Nowhere in the record is there any hint of use of precedent by court or counsel. I know with all the out of court hours spent with my two learned counsel they ever mentioned any review of precedent or court rules to help solve a very serious juror contact problem. I now understand why. There is sound discretion, substantial discretion, broad discretion and abuse of discretion. "Impartiality" is a state of mind and not technical conception. See quote following:

> "Impartiality" is not a technical conception, but is a state of mind, and for ascertainment of such mental attitude of appropriate indifference, this amendment guaranteeing impartial jury lays down no particular test for procedure and is not chained to any ancient and artificial formula. Dennis v. U.S., 339 U.S. 162, (1950)

> The jury, passing on the prisoner's life, May in the sworn twelve have a thief or two guiltier than him they try. II,i, 19
>
> J O H N M A R S H A L L
> 1755-1835

In the instant case there is both the unitended and unavoidable encounter and the presence of a folded newspaper to a crucial article going to the ultimate issue of the defendant's trial, in direct violation of the many time given court order to not read news accounts of the trial.

> Jurors' assurances of impartiality are not always dispositive of whether their exposure to extrajudicial material has adversely affected their ability to render an impartial verdict. U.S. Herring, 568 F.2d 1099 (11th Cir. 1979)
>
> Jury consideration of facts not introduced in evidence denies a defendant's Sixth Amendment rights to confrontation, cross-examination and assistance of counsel.
>
> Inasmuch as there was reasonable possibility that information concerning defendant's

alleged involvement with the "Mexican Mafia" influenced jury's verdict as to the defendant, jury's exposure to extraneous, prejudicial materials concerning defendant's alleged involvement with the "Mexican Mafia" warranted reversal of defendant's conviction for conspiracy and first-degree murder.

Where proof against codefendant was only that he aided and abetted principal, material which tainted verdict against principal would require setting aside verdict against codefendant in prosecution for conspiracy and homicide.

In prosecution for murder, wherein it was claimed that extraneous information given to jury prejudiced defendants, some of testimony by jurors impermissibly invaded area of mental processes of jurors and to that extent district court was correct in refusing to consider it but to extent that testimony showed that record of official suspicion of defendant's involvement with Mexican Mafia came to attention of jurors, testimony was permissible. United States v. Bruscino, 662 F.2d 450 (7th Cir. 1981).

STATEMENT OF FACTS

Chronological Chart

Oct. 86	Media coverage began... Newspapers, TV and radio... (See A 74-76)
Dec. 2, 1986	Tuesday at 1:25 P.M. Petitioner's nephew, Tommy Cousins, his Grandmother, Petitioner's mother, and five to six jurors entered a courthouse elevator at the ground floor and ride to the third floor; seventy seconds and two hundred plus words!
Dec. 3, 1986	Wednesday, at 1:30 P.M. Judge Paul says, "about five minutes ago the jury told me, that yesterday, in the elevator, an individual who they thought was a part of Mr. Cousins' family, and they have described the individual to me, KEPT talking to them, ABOUT THE CASE, and whether or not they thought Mr. Cousins was guilty, or not guilty, or what have you, and he persisted. 1:45 P.M. Jury enters, TWO JURY QUESTIONS, WITH NO

STATEMENT OF FACTS-continued:

JURY RESPONSE!

1:55 P.M. (two pages of bench discussion) Jury recess...and Judge recess!

2:00 P.M. Judge returns... with counsel.

(Judge Paul refuses to tell jury defendant had nothing to do with it! Judge Paul and Booth plowing new ground!)

THEY TOLD ME THIS WOULD NOT COLOR THEIR VERDICT! When did they tell the Judge this? OUT OF THE PRESENCE OF COUNSEL AND THE DEFENDANT AT 1:25 P.M.!

The Judge talked to the jury out of presence of counsel and the defendant! Judge Paul told them that, "IT SHOULD NOT ENTER INTO ANY CONSIDERATION IN THEIR DELIBERATIONS!" I told them that! (page 104, 105) (The Judge violated U.S.C. Rule 43!)

FOCUS ON FACETS/ASPECTS OF ISSUES PRESENTED (1-34)

Status of the Cousins case with regard to the media and encounter issue(s)

1) One-third the way into the trial.

2) Jury discussed the "encounter" "incident", words said by Cousins' nephew, for a period of at least 24 hours, in point of fact, they held it on their minds from, Wednesday, December 2nd, 1987, at 1:05 P.M., overnight to 1:25 P.M., Thursday, December 3rd, 1987k, when they made their initial report to the Judge. (A-29, 30, 31)

3) How, when, or where these discussions (in 2) took place is unexplored in the record.

4) Further, the extent, degree, duration, nature of these discussions is not explored in the record. (No court reporter or counsel or petitioner present).

5) Judge Paul asked all these questions off the record in the three occasions he held conferences with the jury on these ultimate issues, until he (told) ordered Cousins' nephew admissions of guilt not to effect/influence the jury deliberations. (A-37, 39, 44, 45-64).

6) Judge Paul had three

conferences outside the presence of counsel for the parties. (A-23-63).

7) Judge Paul states, "...I feel confident the news...tomorrow...HEADLINES (See A-79-80). Headlines about what went on in the trial (today and yesterday)..." "I can handle my jury!" (See A-79, 80, Photo of boxes).

8) Judge Paul denied the Petitioner any statement to the jury regarding his connection with the "incident." (page 108 of trial transcript).

9) (Page 109 of trial transcript)..."I am through with this jury with the issue!..." (See A-52)

10) (Page 109 of trial transcript)...Judge Paul, "it said, 'is he guilty or is he not guilty...IT IS OVER WITH...(one-third into the trial).

11) Cousins' counsel, "I am lost, I REALLY AM. I JUST REALLY DON'T KNOW WHAT TO DO ABOUT IT." (A-42-53)

12) Judge Paul, "Tell him (your client) I am not going to make a statement to them (the Jury) that he (Cousins) had nothing to do with it."

13) Cousins feels the direct

question should be asked!

14) Petitioner knows a lady juror (Land) communicated, "You did it!" When the question was asked! I knew at this moment I could not get a fair trial!

15) Page 112...DID THE JURY THINK HE HAD ANYTHING TO DO WITH IT? (I.E. Anything as to origination, instigation). At this point, all threshhold tests are met. Full investigation is triggered.

16) Judge Paul limits his investigation. He limits his questions to "What the nephew said as to what his identity was? Did the nephew identify himself? The jurors knew and assumed they knew who each other were after five eight hour days in the courtroom. Jury taint and contact/presence by insider compounded by newspaper in jury room with the article and statements as to Petitioner's guilt.

17) Judge asked two limited questions on two occasions of the jury, (Where the second question on the first occasion evoked a NO response) created such prejudice, impropriety during trial and was highly probative as to "guilt", the ultimate issue of this trial. Can reasonable minds not agree? Judge Paul was not deterred...he prepared the jury for a second set of two questions. (See trial transcript 104 line and the top of page 105)(A-

44-45)

18) Whether or not Judge Paul's handling of the "incident" and attendant media problems constitute an abuse, improper use of discretion (power) given the circumstances described in the instant case?

19) Whether or not the jury was tainted beyond reasonable limits?

20) Whether or not the Petitioner was afforded a fair hearing to determine the nature, extent and degree of jury taint and the reasonable possibility of prejudice, or the leaning to one side (Black's Dictionary)

21) The government does not assume its heavy burden, as the threshold line is met and exceeded. It only asks that the same two questions to be reasked.

22) The government sides with the Judge that "...its not fair to ask...IF MR. COUSINS HAD ANYTHING TO DO WITH THIS ("INCIDENT") Judge Paul knew the answer!

23) Mr. Booth: "WE HAVE GOT TO KNOW!"

24) At this point, the court reporter (Darlene Pino) could not contain herself, stating the obvious, "YOU COULD POLL THEM (the jury) INDIVIDUALLY!"

25) Mr. Douglass: Picks up this, obvious, good idea, "good point", he stated, and made a motion to Judge Paul, which, of course, was expressly denied in thought, word and deed. No individual jury questions!

26) Court took a five minute recess...during which time he (Judge Paul) had another conference with the jury without counsel for the parties or a court reporter.

27) A bench conference to announce the fact that the same two questions will again be asked of the jury by Judge Paul.

28) The same two questions are asked...i.e. 1) the instigation, prompting or origination of the "incident", and 2) enter into or AFFECT (not effect) your consideration of the merits of this case. (Page 114 in trial transcript)

29) On December 4, 1986, Friday, at 9:30 A.M., Defense Motion...impossible to receive a fair trial under the circumstances...coupled and compounded with the newspaper article that appeared this (a.m.) morning. (See A-79-80/Newspaper boxes)

30) The article states, "A member of the family, (who ought to know) made the comment, "HE'S GUILTY?

isn't he?" The prejudicial (Black's, leaning towards one side, other than evidence received) (Webster's, tending to injure, or impair-detrimental) EFFECT (leading to premature judgement or unwarranted opinion or judgement)...of that...is just something to DIFFICULT TO OVERCOME...a fair trial with this jury.

31) The government, to bear their heavy burden shift...of the presence and contact, state, "It (the article) was not on the front page...and I can't really offer any more."

32) The court refuses to see, talk with or have any communication with Cousins' nephew who was available for questioning immediately and waiting for the Judge.

33) The Judge...Judge Paul misstates the fact that he asked the questions that both sides wanted asked. He refused to ask many questions that should have been asked.

34) The court warned counsel: "I wouldn't bring it (the "incident" or "motion") UP AGAIN, you have protected your record." December 4, 1986, (See A-73) Judge Paul, talked to the jury without counsel and/or the Petitioner, about a very crucial issue. Judge Paul violated Rule

43(a).

STATEMENT OF FACTS: JUDGE PAUL'S COVER-UP DURING TRIAL-- PART I
ACTS 1-21.....PAGES 33-41
POST TRIAL--PART II
ACTS 1-15.....PAGES 41-47

STATEMENT OF FACTS

Gainesville, Florida, located two hundred southeast of the capital, Tallahassee, where Judge Paul has his home. He came to Gainesville to preside over a local, media blitzed celebrity...who reportedly fronted aircraft to major drug smugglers---according to the TV station, radio station, and one newspaper. (See A-79-80)

What Billie Sol Estes and Dr. Sheppard, and F. Lee Bailey were to the nation and Victor Posner was to Miami and Everett Bennet Williams---the Petitioner was to Gainesville, from a media point of view. And Gainesville is "Hicksville". Where everybody, knows everything, about everybody, and need not necessarily rely

on the media. The Petitioner was newsworthy, as owner and founder of the major aircraft business in town. Into this milieu Judge Paul entered as a fanatic in judicial economy...a laudable feeling and purpose...but not for Petitioner as its celeb in a Peyton Place...billed as a "drug smuggler". Gainesville is a very small town (population 51,000).

Into the prosecution case on the fifth day of trial an incident occured of newsworthy proportions. A talkative and verbose, 18 year old, nephew of the Petitioner, who was a "used car salesman" locally, met five to six of his uncle's jurors in the elevator of the courthouse. Tommy Cousins (See A-81-82) was with his Grandmother (See A-83-84) during the elevator ride...who listened to the entire two hundred plus words, persistent

interrogation of the jurors, or, as Judge Paul put it, "He, Tommy Cousins, just kept it up!" The jury, in their initial and only report, conveyed an approximation of fourteen words, leaving one hundred and eighty-five or so words unaccounted for, and unasked about. The newspaper carried seven words the next morning. The Court of Appeals notes this as "largely unclarified."

The jury held these words and pondered them in their hearts for twenty-four hours and discussesd the two hundred plus words among themselves; which was also unexplored, unasked and masked by Judge Paul.

Do these circumstances manifest a reasonable possibility of jury taint? Is there need to ask more than the limitedly designed questions asked by Judge Paul as to who instigated these words? I think

the answer is manifestly clear! They, the jury, came forth, voluntarily, and openly and revealed their taint, their experience, their bias; but Judge Paul only asked questions as to who instigated the barrage of words? His questions were designed to cover up any reasonable possibility of taint. His questions were not neutral, but for one side only. His questions were in the interest of judicial economy and his return home to Tallahassee.

I, respectfully submit, as reasons, part of many more to follow, for granting this writ, "Not as a super-legal aid bureau" do I ask the "Nation's ultimate judicial tribunal" (Uveges v. Penn., 335 US 437, 449 (1948) but, as an issue of issues relative to the questions presented, the following two pronged strategy of Judge Paul's cover up and his

attempts to neutralize, minimize the chronic seriousness of the jurors initial and only report.

I submit Judge Paul's during trial cover-up in part I, and post trial cover-up in part II.

1) The two questions he asked the jury were calculated, extremely limited by design. (A-23-63)

2) The questions are only concerned with who instigated the two hundred plus words...not with their nature, extent, duration, or content. (A-52-64)

3) He absolutely refused to widen the scope of his responsibility for inquiry. (A-52, 54, 59, 60, 61, 62, 63, 64)

4) He refused to ask any questions defense counsel wanted asked. (A-52-64)

5) He prepared the jury for the questions on the first occasion by telling them what to say and how to answer. (A-52-64)

6) He received a, "NO RESPONSE" on his first effort, so he tried and got two negatives the second time around. (See pages 100-114)(A-38, line 16)

7) He told the jury what to say on trial transcript pages 104 and 105, "...it should not enter into any consideration whatsoever in their deliberations. I TOLD THEM THAT! I DON'T KNOW WHAT MORE I CAN TELL THEM." Judge Paul told the jury "that" outside the presence of counsel, at a significant

stage of the trial, the Petitioner was excluded as well as counsel...a clear violation of Rule 43(a).

8) Juror Land, held this "incident" against the Petitioner, in the courtroom by her look and scowl and anger at the Petitioner and when she told the press, "We just could not believe HIM!"

9) Judge Paul refused to ask and/or tell the jury that the Petitioner had nothing to do with prompting or instigation of his nephew's admissions to the jury. (A-23-63)

10) Judge refused to fully investigate the reasonable possibility of jury taint in violation of Rule 606(b) and its progeny of precedent. (A-23-63)

11) Judge Paul refused to see, interview, or talk with on this fifth day of trial, the Petitioner's nephew, who was available and waiting! (A-71-72)

12) Judge Paul warns Petitioner's counsel, sternly and definitively, "I WOULDN'T BRING IT UP AGAIN!" In a loud, harsh tone of intimidation, which of course, does not clearly show in the record...as if scoulding-nasty. (A-73, line 5-6)

13) Judge Paul has suppressed evidence regarding this issue since the date of the "incident".

14) The two cleverly designed questions Judge Paul asked the jury created a hollow formality to fulfill the required hearing requirements.

14a) Judge Paul refused and denied Petitioner's motion to have the jury polled individually, or asked any individual questions to each of them.

14b) Judge Paul states, "I AM GOING!" (Trial transcript, page 113, A-

62) He then, "goes" to talk to the jury for the second time. To prepare them for the second set of two identical questions. This time he secures his desired response to both questions. (A-63-64)

15) Judge Paul made no findings of fact as to the initial and only reported "incident".

16) He gave the jury no admonitions that whatever they heard/read in the newspaper, TV or radio they should disregard, and not consider "IT" except when he told them "HOW TO ANSWER HIS QUESTIONS!" Off the record.

17) Judge Paul gave no curative, protective, or insulative instructions at the end of the trial, during his charges to the jury.

18) He delivered no curative admonitions once the barrage of prejudicial words were impregnated into juror consciousness.

19) Judge Paul injured and impaired the integrity of all that is embraced in the Constitutional trial by an impartial jury.

20) Judge Paul injured and impaired the integrity of a fair and impartial jury, "where the jury is, inspite of all the protections and insulations, they are extremely likely to be impregnated by the environing atmosphere." (A quote from Oliver Wendell Holmes, 1888)

Part II Post trial cover-up, by Judge Paul.

1) Judge Paul imposed a three year sentence on the Petitioner's nephew, Tommy Cousins.

2) Judge Paul sealed the in camera hearings and the record for Petitioner.

3) He continued his no access rule, correctly as to mental process, but wrongly as to prejudicial extraneous and crucial contact.

4) He refused the Petitioner access to the post trial transcript in which the Petitioner is the only interested party, with the exception of the Supreme Court in their supervisory capacity.

5) Judge Paul seeks to justify his improper use of privilege by the above seemingly correct procedures.

6) Judge Paul is in fast forward in his cover-up and the suppression of the incident and voir dire "Questionaires". (A-86-88)

7) He knew the media and the "incident" was extremely prejudicial and a rebuttable presumption and he has taken over the government's heavy burden.

8) The government only stated, "Just ask the same two questions again!" "I have nothing more to say" Page 106 of trial transcript. (A-59-60)

9) Judge Paul, says, "I CAN HANDLE MY JURY!"

10) What made the difference in my trial was Judge Paul's cover-up, sweeping under the carpet, with hollow procedure, by his refusal to look at juror taint, along with the two hundred word incident and other unfavorable media coverage.

11) He sealed juror taint into the record, by not permitting Petitioner the transcript of the liasion/romance with intimacy in the last two crucial days of trial between United States Deputy Marshall Moons and Juror Marion Land.

12) He permitted Petitioner's counsel to be present but not to ask any questions, during post trial in-camera

hearings.

13) Juror Land has stated, "I met the most wonderful Marshall (Moons) and I was intimate with him. (At the Best Western in Gainesville, during the last two days of the trial...when I returned home) I do think this effected my jury deliberations."

14) This juror romance became the "talk" of the county surrounding Mayo, Florida.

15) Judge Paul delicately and cleverly designed his questions in the post trial hearing to continue his cover-up and sealed the record from Petitioner.

> "A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case." Smith v Phillips, 222, 71 L.Ed 2d 78 and participation Porter 72 - 93 L.Ed.
>
> See also Remmer v United States, 347 US 227, 229-230.

ARGUMENT & CORRELATION

Petitioner had a lease-purchase plan with Corporate Ventures and F & Q Corporation four aircraft, out of three hundred plus aircraft and six years of sales, '78-'83, were involved in my case. The key prosecution witness, Frank Brady, stated that I had no agreement to smuggle dope into the U.S.A. The government assembled circumstances, put together documents and testimony that convinced a jury by inference and implication that I was guilty. The straw that broke the camels back, that last and final nail in the coffin, precipating factor was the jury taint, the media facts and direct contact by my nephew that persuaded the jury I was guilty.

Housekeeping on aircraft, repo's, cash payments, bank deposits, summary witnesses, was the circumstantial

evidence and what the government put together to convict me.

The point I am trying to make here is the significance of extrinsic evidence the jury had in their possession and consciousness. In an inference and implication type of case, extrinsic evidence has much greater importance than in an overwhelming evidence case. And Judge Paul should have scruplously observed case law and Rule 43 in this regard...in a case where all the evidence against Petitioner was circumstantial.

After the fifth day of trial, after the incident and the media article on the fourth of December, 1986, I could feel the attitude of the jury change towards me--I could feel the hostility of juror Land and others directed towards me, a change from fairness and impartiality shown towards me in the first five days;

to anger and resentment for wasting their time. I could also feel this non-verbal communication during the time I was on the witness stand. I could see it in their faces, their gestures, their eyes.

A jury taint or impropriety is harmless only where there is no reasonable possibility of prejudice present, U.S. v. Brantley, 733 F.2d 1429 (11th Cir. 1984) page 1441. Brantley continues to discuss, "...even a single juror tainted by extrinsic evidence, (as in the instant case all twelve jurors could not answer Judge Paul's question--except with--NO Response!), the slight weight afforded to jurors' assertions...is premised upon the elicitation of such an assertion from all members of the Jury."

In Perkins, 748 F.2d 1519 (11th Cir. 1984) the Court concluded, "the

likelihood of prejudice was obvious." And, "...the government did not successfully rebut the presumption that the extrinsic evidence...was prejudicial." In the instant case, the government could only say, "I have nothing to say." (A-17, 20, 62) In U.S. v. Titsworth, 422 F.S. 587, (D. Nebr. 1976), "Where jurors have knowledge of extrinsic (evidence) information reflecting upon the defendant's defense," the Court stressed, "the likelihood of prejudice is particularly great."

The well established precedent of the United States Supreme Court 1 is that any extraneous contact with a juror and/or jurors about a matter pending before those jurors is presumptively prejudicial and that "the burden rests

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1See all S.Ct. cases in Table of Authorities.

heavily upon the government to establish that such contact was harmless." Remmer v. U.S., 347 U.S. 227, 229 (1954) "The Supreme Court has long held that the remedy for allegations of juror impartiality is a hearing in which the Petitioner has an opportunity to prove actual bias." Smith v. Phillips, 102 S.Ct. 940, 945 (1982) Accordingly, the former Fifth Circuit, Richardson v. U.S., 360 F.2d 366, 396 (5th Cir. 1966) held that a factual allegation in a defendant's motion for a new trial "must stand confessed" in the absence of a hearing. In Richardson the Court of Appeals remanded the case to the district court "with directions to hold a hearing (not as in the instant case, ask two limited design questions, and talking to the jury without counsel), to determine whether the incident complained

of...occurred as alleged." Id. at 369. See also U.S. v. Thomas, 463 F.2d 1061 (7th Cir. 1962) U.S. v. Doe, 513 F.2d 709 (1st Cir. 1975) U.S. v. Forrest, 620 F.2d 446 (5th Cir. 1980) where a new trial was required when the Government could not and did not prove that an off the record contact had no effect on the jury.

In Parker v. Gladden, 385 U.S. (1966), the Court reversed the defendant's conviction because a bailiff had expressed his opinion to a juror that the defendant was guilty. The parallel is even closer in U.S. v. Cousins, where an insider/nephew of Cousins' expressed the guilt of his uncle to five to six jurors, and media coverage of that fact was compounded and coupled with an intimate romance between U.S. Marshall Moons and juror Land during the last two days of trial and deliberations.

In Marshall v. U.S., 360 U.S. 310 (1959), the Court held that exposure of some jurors during trial to newspaper articles concerning prior convictions of the defendant was so prejudicial that the defendant was entitled to a new trial. The former Fifth Circuit, in U.S. v. Williams, 568 F.2d 464 (5th Cir. 1978), held that the defendant had been denied his right to a fair trial by an impartial jury when two jurors had been exposed to a newscast reporting that the defendant had been convicted at a prior trial. Similarly, in U.S. v. Gilbert, 446 F.2d 559 (5th Cir. 1971), the Court ordered a new trial because one juror remembered having heard the defendant's name in connection with an unrelated murder trial. The Fourth Circuit, in Holmes v. U.S., 284 F.2d 716 (4th Cir. 1960), found prejudicial error where a juror received

information during trial that one of the defendants was serving a sentence in county jail.

In Turner v. Louisiana, 379 U.S. 466 (1965), where two deputy sheriffs were in intimate association with the jurors, eating...conversing...doing errands...the Court reversed and remanded the case. Because "in such cases there may be prejudice of a kind exceedingly difficult to establish...but where, in this case,...it should be especially condemned." "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." In U.S. v. Cousins, there is a U.S. Marshall-Juror contact, massive local media contact, and an insider/admissions contact. U.S. v.

Cousins is the ideal case for the ultimate tribunal to speak, clarify and set a standard for the Nineties; for media contact, and personal contact that threatens juror impartiality---and reaffirm and clarify for the Nineties the mixed "bag" of cases floating around in the districts. Let this case be known as the case to be referred to: THE COUSINS/NEPHEW MEDIA CASE. Let the integrity that was and is meant to be embraced be preserved by a current and clear statement by the ultimate tribunal for all five hundred plus Federal Judges to drink from the trough of wisdom. The media could learn and be helped also by this wisdom. The issue/question presented has massive appeal and effects everyone, as well as the five hundred plus Federal trial Judges.

Judge Paul made a sham of the remedy

mandated in the above cases--he covered up the alleged facts with a hollow procedure, with a clever contrivance.

Please contrast and compare U.S. v. Posner, 644 F.S. 885 (S.D. Fla. 1986), where Judge Spellman wrote and acted magnificently in the exercise of his sound discretion/power. I wish to adopt into this brief the entire opinion and its seven quoted cases as a shining example judicial wisdom versus Judge Paul. I wish to adopt and adapt into this brief the following: Sheppard v. Maxwell, 384 U.S. 333 (1965), U.S. v. Perkins, 748 F.2d 1519 (11th Cir. 1984), Remmer v. U.S., 347 U.S. 227 (1954), U.S. v. Howard, 506 F.2d 865 (5th Cir. 1975), U.S. v. Winkle, 587 F.2d (11th Cir. 1979), Owen v. Duckworth, 727 F.2d 643 (7th Cir. 1984), U.S. v. Vaquez, 597 F.2d 192 (9th Cir. 1979).

To put the question or issue as presented another way: Is now the time to make a clear and useful policy statement in opposition to U.S. v. Cousins regarding the issue presented. The cases cited certainly cry out for this need to be filled. Judge Paul thought judicial economy would take precedent over the precedents cited and the Court of Appeals agreed with him. How many other media incidents are occurring all over the districts following U.S. v. Cousins. The media is increasing their insight, coverage, quantity and quality of reporting cases on and before trial. Someone should guide them, instead of hit and miss---The Constitution, Rules and cases have made a good start, let's make a bad case (U.S. v. Cousins) into good law.

I have read, examined, and looked

at, three hundred plus cases, doing research for this certioari; in the limited time and available volumes in the Law Library for inmates. I am amazed at the many and varied viewpoints and divergencies in the cases herein cited and researched. Certainly, there can be a better way to handle the issue presented. We have the technology to inhabit Mars in the Nineties. We can do better with the media communication and jury impartiality before, during, and after taint occurs. Counsel and Judge Paul, in the record, cited no rules nor do they appear to have looked at any rules or cases---I know my counsel did not. They played it from hip in the ongoing trial by ambush. I certainly see it differently now, after consulting some cases. But, even if Judge Paul would have looked at the rules and cases at the

media moment, he would have found the maze, labyrinthine passageways and blind alleys of these three hundred plus cases. Please do not fail to grant my petition because of the complex and tortuous structure presented. Great and hard cases can make great law and resulting justice: Amend VI, 606(b) & 43.

A court removed from the scene cannot call Judge Paul's "talks" with the jury harmless. He said, "I told them that." "It should not enter into any consideration whatsoever in their deliberations." "I don't know what more I can tell them", but, "I am not going to tell them, that Mr. Cousins had nothing to do with it." Judge Paul just left the inference exist and hang in front of the jury. He left the implication that Mr. Cousins prompted and instigated the nephew. (A-81, 82) They knew Mr.

Cousins' nephew. His grandmother, (A-83, 84) was with him in the elevator and sat next to him in the courtroom in the Petitioners section and area well known to the jury for five days and forty hours. Judge Paul compounded and enhanced the admitted problem and stonewalled all attempts to investigate with---"I wouldn't bring that up again."

Judge Paul could have at least followed as a minimum, the quote as set forth in, Government of the Virgin Islands v. Gereau, 523 F.2d 140 (C.A. Virgin Islands, 1975)

Though, I note that, the jury could answer three of the four Judge prepared questions; one question was the fact that the jury, all fourteen of them, could not answer the question, did the non-instigation of the "incident" and its effect on their deliberation twelve days

into the future, I wish to note that these answers are not controlling. See U.S. v. Williams, 568 F.2d 464, pages 470-471 (5th Cir. 1978) The district court may consider such testimony, but it must also consider such factors as the nature, extent, duration, intensity, timing, degree, publicity of the extrinsic evidence, whether or not the jury initiated such evidence, along with the strength of the evidence presented by the government against the Petitioner. The district court as well as the Court of Appeals held differently, in fact diametrically opposed, from many other opinions in the Eleventh Circuit and many other circuits. See Table of Authorities for thirty of them.

Though there is no, "magic formula that the trial court must follow in conducting the inquiry...it must use

whatever inquisitorial tools are necessary and appropriate to determine whether there was a reasonable possibility of prejudice." U.S. v. Savage, 701 F.2d 867, 871 (11th Cir. 1983). Judge Paul's handling of the facts and circumstances in the instant case is crying out for the ultimate tribunal to exercise its supervisory and set a clear standard; using Judge Paul as a shining example. While there is surely no magic formula, reason and good practice is the better magic, coupled with some better clarified standards from the ultimate tribunal.

The communications between Judge Paul and the jury on his preparation of the questions is a blatant and egregious practice directly under the rule and the Sixth Amendment with me as its victim and setting the Eleventh Circuit standard for

the entire world to see. This case goes way beyond the interests of the parties. Let this case go forth as the "Cousins/nephew media case."

In U.S. v. Gypsum, 438 U.S. 422 (1978) "an ex parte meeting between the trial judge and the jury foreman, agreed by counsel, to determine the jury's physical condition and prospects for a verdict--was improper, and alone warranted reversal of the convictions." "Where the exchange with the judge suggested the strong likelihood that the foreman carried away from the meeting, restated to his fellow jurors, the IMPRESSION that the judge wanted a verdict one way or the other."

In the instant case, Judge Paul told and prepared the jury how to answer the questions, without consent or knowledge of counsel, and on two specific times and

occasions, on the ultimate issue of the trial, evidence extrinsic, heard directly by five to six jurors and restated to fellow jurors, over a twenty-four hour period before reporting the guilty admissions to Judge Paul. Clearly, U.S. v. Gypsum strongly differs from the holdings of the District Court and the Court of Appeals in U.S. v. Cousins. In Cousins, the factual base is significantly stronger.

Judge Paul's meetings with the jury were, "pregnant with possibilities for error, since it was difficult to contain, much less to anticipate, the direction the conversation will take...inevitably risks innocent misstatements of the law and misinterpretations...and the absence of counsel aggravates the problems." Id.

The Judge in U.S. v. Gypsum made a transcript of his meeting with the jury

foreman, unlike Judge Paul.

In the issue as presented, I am not arguing that the setting of the trial was inherently prejudicial or that the jury selection process was permitted an inference of actual prejudice. See Murphy v. Florida, 421 U.S. 794 (1975). But what I am arguing is that the setting of the trial in pretrial and during trial media coverage was a time bomb waiting to explode, and it did blast off with the "incident" and resulting "headlines" the next day as found in the jury room. The pretrial publicity, print and visual/audio (A-74-76,79-80) is here presented because the sufficiency of the evidence is that there is not direct evidence of any crime, only indirect and circumstantial and that very weak. The prosecutor said in closing, on rebuttal, "...lawyers and sales people did the

leases, CPA's did the books...hey, everything was legit, ladies and gentleman, everything, corporations, people looked legit, they ran around with the stars, singing stars, politicians, out there, FINE. The rich can't commit crimes? He entered his reputation in the community. Some said it was good. Some not."

Four aircraft, taking the evidence in the best interest of the government, sold by others out of three hundred and thirty plus aircraft in six years were involved in my case. I accounted for all my bank deposits. The government put together, assembled bits and pieces to create evil inferences. The media was the precipiating factor, in their ongoing coverage of the headline news of the "incident" in the jury's consideration of extraneous evidence, that caused the

scales of justice to tip against me in this precarious trial setting. The subtleties of the jury decision making are inscrutable. In the instant case, the media and the headline "incident" made the difference.

My counsel, after a night and morning of meditation and pensiveness were shocked at Judge Paul's denial of the mistrial motion. I am still shocked as I read his conduct and imperviousness. He was not capable of being effected by the obvious...and his concern for judicial economy, however out of balance application was.

I ask, further, that in the exercise of the Supreme Court's supervisory power, that another judge hear the questions that should be asked of the jurors in an open candor courtroom. I further ask that this court permit my counsel to ask

the jurors appropriate questions in line with Rule 606(b).

I submit respectfully, that the jurors in my case will not answer freely and openly, questions asked of them by Judge Paul, due to his private talks with them during my trial.

I submit respectfully, that the jurors in my case are in fear of him and his reputation in the community...especially due to his three year sentence imposed on my nephew.

I, submit respectfully that my case is not nearly unique as to the issues presented and has great national interest beyond the interest of the parties. And has presented, continually recurring unsettled questions, daily and hourly in courts across our land.

What should or might Judge Paul have done when the threshold of media and

direct contact with the jury was triggered?

1) ...fully and completely explored the media coverage with the jury.

2) ...fully and completely asked the jury the nature, degree, extent, duration, timing, intensity, depth of the media contact for part I, and II, and the same for the direct contact.

3) ...call attention to the governments heavy burden to show the matters(s) harmless...at least discussed the "shift" and the rebuttable presumption issue, threshold, and triggering.

4) ...not have talked to the jury privately, outside the presence of counsel and Petitioner.

5) ...accomplished the above collectively and individually.

6) ...encouraged and permitted counsel for the parties to do the same both collectively and individually.

7) ...given, during trial admonitions direction on this issue and situation and end trial instructions they could take to the jury room on this issue.

8) ...Tommy Cousins was waiting

and available for Judge Paul to interview him timely...on December 4, 1986. Judge Paul says, "No way, now!" (A-74-76)

9) ..."The Court's attempt to downplay the seriousness of these charges..." See Tanner v. U.S., 97 L.Ed. 2d 90 (1987) Justices Marshall, Brennan, Blackburn, and Stevens in their dissent.

10) ...Judge Paul could not have read Tanner v. U.S....especially the dissent! Or, counsel, as it would have been reflected in the record, somewhere, somehow.

I am not asking for a perfect trial, just impartial jurors and a fair trial. I ask, not just that the great jury system to survive, but that it will continue to be a success based on the Constitutional guarantees on which it fittingly deserves.

Tanner is a very different though similar case from my case. Please reclarify and redefine a proper and adequate "evidentiary hearing" in the light of the suggestions made by a layman

in this brief...and make Judge Paul's example, THE example.

I would like to conclude with the great words of Justice Frankfurter in Irvin v. Dowd, 366 U.S. 717, pages 760-761, (1961) on media saturation of the jury.

> "These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury. But again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a

week ago, to reverse a conviction in which prejudicial newspaper instruction has poisoned the outcome. This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade."

And, last but certainly not least, the great words of Justice Marshall, with whom Justice Brennan joined, Porter v. Illinois, 93 L.Ed. 2d 273-274 (1986).

"The right to a trial by an impartial jury lies at the heart of due process. This Court has held that due process requires both 'a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent, prejudicial occurrences and to determine the effect such occurrences when they happen'. 'with all interested parties permitted to participate'. 'was woefully inadequate when measured by our decisions in Phillips and Remmer. At a minimum, due process requires that the defendant be allowed to question the juror on the issue of bias.' 'determinations in Remmer-type hearings will frequently turn upon

the testimony of the juror in question'. 'counsel reasonably considered himself foreclosed from contacting her in connection with his motion for a new trial before the same judge. Thus, while petitioner had the burden of showing both bias and actual prejudice, the trial judge's admonitions appeared to deprive him of the only means of doing so. I continue to believe that the defendant should not bear the burden of showing actual prejudice when the probability of bias is substantial, as it is in this case."

ALTERNATIVE CONCLUSION(S)

As an alternative prayer or conclusion, I hereby request this Court for a Summary Reversal, or as a second alternative prayer, I hereby ask this Court to exercise its capacity in its supervisory power to vacate and remand to the lower Courts for further consideration on the issue(s) previously described and argued as:

CONCLUSION

Based on the foregoing grounds, reasons, theories, cases and citations, the Petitioner, William Patrick Cousins, respectfully requests that a writ of certiorari be granted to review the judgement of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted, this 20th day of July, in the year of our Lord, 1988.

William Patrick Cousins
08275-017
P.O. Box 600
Eglin A.F.B
Florida 32542-7606

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OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS, AFFIRMED DATED, APRIL 19, 1988

UNITED STATES of America,

Plaintiff-Appellee,

v.

William Patrick COUSINS,

Defendant-Appellant.

No. 87-3065

United States Court of Appeals

Eleventh Circuit.

April 19, 1988.

Defendant was convicted of conspiracy to import cocaine and income tax evasion by the United States District Court for the Northern District of Florida, No. GCR 86-13-MMP, Maurice Mitchell Paul, J., and he appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) denial of defendant's motion for mistrial based on

juror's encounter with third party identified in newspaper article as defendant's nephew was not abuse of discretion, and (2) evidence of defendant's prior drug use was admissible in order to disprove self-serving testimony that defendant was strongly opposed to drugs.

Appeal from the United States District Court for the Northern District of Florida.

Before HATCHETT and EDMONDSON, Circuit Judges, and MARKEY*, Chief Circuit Judge.

EDMONDSON, Circuit Judge:

William P. Cousins was convicted of conspiracy to import cocaine and income tax evasion.1 Among other things,

---

1Cousins was convicted of one count of conspiracy to import cocaine, in violation of 21 U.S.C. sec. 963, and three counts of income tax evasion, in

Cousins contends that reversible error was committed during his trial when: 1) the district court denied his motion for a mistrial after a local newspaper reported that a member of Cousins family contacted members of the jury; and 2) rebuttal testimony concerning Cousins' prior drug use was admitted over his objection. We affirm the convictions.2

During the prosecution's case-in-chief, the jury informed the trial judge that a person had approached several jurors in an elevator outside the courtroom and had begun asking questions, such as, "He (referring to Cousins) is guilty, isn't he," or words to the

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violation of 26 U.S.C. sec. 7201.

2In his brief, Cousins raises four additional claims on appeal. After reviewing these claims, we conclude that they are without merit.

effect.3 The jurors then explained that they had told the speaker that they were not supposed to discuss the trial; but the person continued to ask questions until the jurors walked away. The trial judge asked whether the person had identified himself in "any manner, whatsoever as to who he was or if he had any relationship to this case whatsoever?" The jury spokesman responded, "No."4

3Precisely what was said to the jurors is unclear from the record. When asked by the trial judge what had happened, one of the jurors responded:

> We was coming up in the elevator after lunch. A young boy that has been in the audience come up with us and he was asking several questions about the trial. We told him we couldn't talk about it. He kept persisting. He said, 'he is guilty, isn't he' or 'is he guilty', or 'it is over with, they don't have any more.' Just statements like that.

4In addition, the trial judge subsequently asked the jurors the following questions:

Cousins' attorney requested a bench conference and informed the district court that the person who approached the jury may have been Cousins' eighteen-year old nephew. Defense counsel also expressed concern that the jurors might react unfavorably if they believed that Cousins had arranged the incident in order to obtain a mistrial. After a

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> THE COURT: I would like to ask the entire panel something.
>
> The experience as you have told me--and it is proper that you all tell me--I have asked you to do it and I thank you. Has this incident created any problems in your mind that would prevent you from putting that aside and proceeding with this case basing your decision only upon the evidence and the law and disregard what was said to you or attempted to be said? Does anyone have any problem?
>
> THE JURY COLLECTIVELY: (Negative Responses).
>
> THE COURT: Is there anyone at all, now that thinks that would influence them one way or the other in this case?
>
> THE JURY: (No Response).

brief recess, Cousins stated he wished additional time to consider whether he would move for a mistrial.

After the district court discussed with counsel how best to determine whether any jurors were prejudiced by the incident, the following questions were asked of the jurors:

> THE COURT: Do any of you at this time, feel that the incident you have described and told us in open court was prompted or instigated by either the government or the defendant? Any of you feel that way?
>
> JURY COLLECTIVELY: No.
>
> THE COURT: Secondly, will the incident in any manner enter into or affect your consideration of the merits of this case?
>
> JURY COLLECTIVELY: No.
>
> THE COURT: Thank you.

Satisfied with these responses, the district court permitted the trial to proceed. Prior to the evening recess,

the jurors were instructed "not to discuss this case or anything about this case amongst yourselves or with anyone else. Please do not read, listen to, or watch any news accounts."

The next morning Cousins moved for a mistrial based upon the previous day's events. Cousins also expressed concern over a report on the jury-encounter incident appearing in that morning's local newspaper, the newspaper attributed the remarks to Cousins' nephew. Defense counsel, however, requested no poll of the jurors about whether they had seen the article. The district court, on the basis of the answers the jurors previously provided, denied a mistrial. Cousins contends that the district court erred when it denied his motion for a mistrial.

[1] Preliminarily, we note that the

decision to grant a mistrial based upon allegations that a jury has been unfairly prejudiced by exposure to extraneous information or outside influences is largely within the discretion of the district court and will not be reversed absent a showing that the trial judge abused his discretion. United States v. Khoury, 539 F.2d 441, 443 (5th Cir.1976).[5] Moreover, when a defendant makes a "colorable showing" that jurors have been exposed to extrinsic influences, the district court,

> in the exercise of its discretion, must make sufficient inquiries or conduct a hearing to determine whether the influence was

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[5] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir.1981)(en banc), the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

> prejudicial. However, there is no per se rule requiring an inquiry in every instance. The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality. In other words, there must be something more than mere speculation.

Unites States v. Barshov, 733 F.2d 842, 851 (11th Cir.1984) (citations omitted); Khoury, 539 F.2d at 443 (district court's "discretion extends to the type of investigation required" to ascertain whether jury is prejudiced); see also United States v. Ayarza-Garcia, 819 F.2d 1043, 1051 (11th Cir.1987)("The trial court has broad discretion as to how to proceed when confronted with an

allegation of jury misconduct, including discretion with regard to the initial decision as to whether to interrogate jurors.").

[2] Cousins has failed to demonstrate that any of the jurors were aware that Cousins' nephew was involved in the incident.6 When questioned by the district court on the day of the contact, the jurors denied any knowledge of the person's identity. The jurors also indicated that the incident would not affect their consideration of the merits of the case.

In this case, on the evening prior

6We note the district judge initially stated that the jurors had been contacted by an "individual who they thought was a part of Mr. Cousins's family." Still, when subsequently questioned about this, the jurors expressly denied this fact. Consequently, for the reasons stated in the text of the opinion, we assume that the jurors answered truthfully.

to the appearance of the challenged newspaper article, the district court specifically instructed the jury not the "read, listen or watch" any news accounts pertaining to the trial. Cf. United States v. Herring, 568 F.2d 1099, 1105 (5th Cir. 1978)(reversing conviction where judges' previous instructions concerning trial publicity were inadequate). In addition, the trial transcript reflects that throughout the course of Cousins' trial, the district court admonished the jury not to read any newspaper account of the case. Nowhere does the record indicate that the jury failed to heed these instructions. We will, therefore, presume that the jurors followed the district court's instructions and did not read the newspaper article. See generally United States v. Phelps, 733 F.2d 1464, 1473 (11th Cir. 1984)("The law

presumes that the jury will follow the court's instructions....'). "Because no juror read the article, its publication could not have prejudiced [Cousins]." See Khoury, 539 F.2d at 442; see also United States v. Barshov, 733 F.2d 842, 851-52 (11th Cir.1984)(post-trial motion to interview jurors properly denied because district court "presumed that jurors followed the court's oft-repeated instructions not to discuss the case" even though a juror's son--who attended every day of the trial and overheard discussions occurring outside the jury's presence, who talked to the prosecutor and defense counsel about the case, and who even attempted to discuss the case with one of the defendants--was seen talking to jurors during recesses).

Cousins has presented no colorable showing that either the jury-encounter

incident or the newspaper's account thereof "impugned in any way the integrity of the trial process." Barshov, 733 F.2d at 852. Consequently, the district court did not abuse its discretion in denying Cousins' motion for a mistrial. Nor was the district court obligated to ask the jurors more questions.

Cousins contends that the district court improperly admitted extrinsic evidence of his use of drugs. During the presentation of Cousins defense, he made a motion in limine to prohibit the prosecution from cross-examining him or any character witness about his use of marijuana and cocaine. After this motion was denied, Cousins testified at length about his successful business career, prior military service and various civic activities. In response to questions

asked by Cousins' attorney about previous drug use, Cousins testified:

> Let me clarify 'use'. I never was a user. I experimented with it. I have never ever in my life seen cocaine or marijuana, other than on television, up until 1978, when I went to Fort Lauderdale. And I did get the opportunity to attend many parties, social functions, that were attended by people like doctors and lawyers and people in very high positions in the community. And it seems like drugs were just socially accepted and were done as an everyday like type situation. I didn't--I didn't agree with it, and I have always been an anti-drug person. And because of that and the exposure of our children, we moved [from Ft. Lauderdale to

Gainesville].

In addition, on cross-examination, the prosecution referred to this testimony when Cousins was asked:

PROSECUTION: ...Other than your experience of your experimentation with cocaine at one time, several years ago, is it your testimony that you have never used it or been involved in any smuggling of marijuana or cocaine?

COUSINS: That's exactly what I testified to, and it's the truth.

Thus, Cousins' testimony portrayed himself to the jury not only as a law-abiding, hard-working business and family man, but also as someone vehemently and particularly opposed to illegal drugs.

During the government's rebuttal, two witnesses were called to refute Cousins' statements concerning his anti-

drug sentiments and prior drug use. Both witnesses testified that Cousins had used cocaine since moving from Ft. Lauderdale to Gainesville, two years after the conclusion of the alleged conspiracy charged in count one of his indictment. Cousins objected to this testimony as an impermissible form of impeachment prohibited by Rule 608(b) of the Federal Rules of Evidence.

[3] Rule 608(b) provides, in part, that "[s]pecific instances of the conduct of a witness for the purpose of attacking or supporting the witness' credibility...may not be proved by extrinsic evidence." This rule prohibits a party from introducing extrinsic evidence of specific instances of misconduct in order to impeach the general credibility of a witness. Still, "evidence may be admitted to prove or

disprove material facts in a case, even though a previous witness has testified to the contrary." United States v. DiMatteo, 716 F.2d 1361, 1366 (11th Cir.1983). Evidence relevant to a material issue is not rendered inadmissible because it also happens to include references to specific instances of misconduct of a witness. United States v. Calle, 822 F.2d 1016, 1021 (11th Cir.1987). Thus, extrinsic evidence is admissible where it disproves "a specific fact material to the defendant's case." Id; United States v. Russell, 717 F.2d 518, 520 (11th Cir.1983)("extrinsic evidence which contradicts the material testimony of a prior witness is admissble")(emphasis in original); United States v. Opager, 589 F.2d 799, 801-02 (5th Cir.1979)("We consider Rule 608(b) to be inapplicable

in determining the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue."). Therefore, although extrinsic evidence of prior drug use could not properly be used just to attack Cousins' credibility, such evidence could be used to refute specifics to which Cousins had previously testified.

[4] On direct examination, Cousins' testimony went beyond merely denying complicity in the smuggling conspiracy. Indeed, Cousins made sweeping assertions that he was strongly opposed to drugs and had moved his family from south Florida because of what he perceived as a permissive attitude toward illegal drugs. These assertions represented to the jury that Cousins could not have conspired to import cocaine because he abhorred drug use. Because the government must show

beyond a reasonable doubt that Cousins knowingly and willfully became a member of the conspiracy, see generally United States v. Sanchez, 722 F.2d 1501 (11th Cir.1984), Cousins' anti-drug statements provided the jury with a basis upon which to acquit him of the conspiracy charge. See generally Pattern Jury Instructions (Criminal Cases), Eleventh Circuit, Special Instruction No. 8--Character Evidence (1985 ed.).7 Thus, Cousins made

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7This instruction provides:

Evidence has been offered of a Defendant's good character, and such evidence may give rise to a reasonable doubt.

So, where a Defendant has offered testimony that he is an honest and law-abiding citizen, the jury should consider that testimony, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that the Defendant willfully committed the crime charged.

Pattern Jury Instructions (Criminal Cases), Eleventh Circuit, Special Instruction No. 8--Character Evidence (1985 ed.)(emphasis added). This instruction was given to the jury and we

his true attitude toward illegal drugs a material issue. The government's extrinsic evidence was introduced to disprove Cousins' self-serving testimony that he was staunchly opposed to drugs. Although the rebuttal testimony tended to impeach Cousins' veracity, it also contradicted Cousins' testimony about his anti-drug view which, if believed by the jury, may have led to his acquittal. Under these circumstances, Cousins' attitude-on-drugs testimony was material; and the district court properly admitted extrinsic evidence to prove its falsity.

Extrinsic evidence is permitted to contradict a defendant's or witness' testimony as to a material issue in a case because:

> the ultimate purpose of the rules of

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believe it demonstrates the materiality of Cousins' statements.

evidence should not be lost by a rigid, blind application of a single rule of evidence. Individual rules of evidence, in this instance Rule 608(b), should not be read in isolation, when to do so destroys the purpose of ascertaining the truth. This is especially so when a witness directly contradicts the relevant evidence which Rule 608(b) seeks to exclude.

By admitting the rebuttal evidence, the trial court merely completed the picture as to appellant's true involvement and knowledge in the drug world and thereby corrected a disturbed view of the appellant's testimony.

United States v. Opager, 589 F.2d 799, 802 (5th Cir. 1979) (quoting United States v. Batts, 558 F.2d 513, 517, 518, (9th

Cir.1977); accord United States v. Calle, 882 F.2d 1016 (11th Cir.1987); United States v. Greschner, 802 F.2d 373, 383 (10th Cir.1986); see also United States v. Gonzalez, 491 F.2d 1202, 1204 (5th Cir.1974)(case decided prior to adoption of the Federal Rules of Evidence); Jackson v. United States, 311 F.2d 686-90 (5th Cir.1963)(same).

In sum, we conclude that the district court did not err, it neither abused its discretion in denying Cousins' motion for a mistrial nor improperly admitted rebuttal testimony to refute Cousins' material assertions. Accordingly, the judgment of the district court is AFFIRMED.

ORDER DENYING REHEARING, APPEAL, DATED MAY 27, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-3065

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus,

WILLIAM PATRICK COUSINS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING
April 19, 1988

BEFORE HATCHETT and EDMONDSON, Circuit Judges, and MARKEY*, Chief Circuit Judge.

PER CURIAM:

The petition for rehearing filed by Appellant is denied.

ENTERED FOR THE COURT:

(Signed by J. L. Edmondson)

*Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

TRIAL TRANSCRIPT, OF DEC. 3, 1986,
PAGE 96, LINE 21 THROUGH PAGE 114, LINE 15

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,)

PLAINTIFF,)

VS. CASE NO. GCR-88-00013

WILLIAM PATRICK COUSINS,)

DECEMBER 3, 1986

DEFENDANT.)

GAINESVILLE, FLORIDA

JURY TRIAL

BEFORE THE HONORABLE MAURICE M. PAUL

APPEARANCES:

FOR THE GOVERNMENT:

P. ALAN SPROWLS, ESQUIRE

ASSISTANT U.S. ATTORNEY

227 NORTH BRONOUGH STREET

TALLAHASSEE, FLORIDA 32301

FOR THE DEFENDANT:

DEXTER DOUGLASS, ESQUIRE

AND EDWARD BOOTH, ESQUIRE

311 EAST CALL STREET

TALLAHASSEE, FLORIDA 32301

COURT REPORTER:

R. DARLENE PINO, CSR, RPR

OFFICIAL COURT REPORTER

TALLAHASSEE, FLORIDA 32301

(BENCH CONFERENCE AS FOLLOWS:)

THE COURT: I HAVE GOT A 1:15 SENTENCING AND I AM WILLING TO WORK FOR ANOTHER FIFTEEN OR TWENTY MINUTES IF YOU THINK YOU CAN CONCLUDE IT, OTHERWISE, I WILL HAVE TO LET MY FOLKS GET A LITTLE LUNCH BEFORE WE HAVE TO BRING THEM BACK

HERE.

MR. BOOTH: I WOULD REQUEST WE GO AHEAD AND ADJOURN NOW. I NEED TO READ THIS DOCUMENT HE HAS READ FROM, AND --

THE COURT: I DON'T HAVE ANY PROBLEM WITH THAT. I JUST DIDN'T WANT TO -- I WANTED TO FINISH, IF I COULD, BUT I

DIDN'T WANT TO BREAK UP, EITHER.

MR. BOOTH: WHILE WE ARE HERE, THE DEFENDANT RESPECTFULLY MOVES FOR A MISTRIAL BASED ON THE ADMISSIBILITY OF THE EVIDENCE AND TESTIMONY OF THIS WITNESS REGARDING THE ITEMS HE HAD READ FROM ON THE LETTER ON THE GROUNDS PREVIOUSLY STATED IN OUR OBJECTIONS.

THE COURT: OKAY. DENIED.

(END BENCH CONFERENCE)

THE COURT: LADIES AND GENTLEMAN, WHAT I WAS ASKING THE ATTORNEYS, I HAVE SOME MATTERS NOT CONNECTED WITH THIS CASE OVER THE LUNCH HOUR, AND I HAVE GOT TO GIVE MY FOLKS A OPPORTUNITY TO GO GET LUNCH, AND THEY THINK THAT THEIR

EXAMINATION MAY TAKE MORE THAN FIFTEEN OR TWENTY MINUTES, SO WE ARE GOING TO BREAK NOW.

WE WILL START CROSS-EXAMINATION OF THIS WITNESS -- I AM GOING TO TELL YOU TO BE BACK AND READY TO GO AT ONE THIRTY.

I HOPE I AM READY. IF NOT IT WON'T BE LONG AFTER THAT. BUT I'LL BE IN HERE ON SOME OTHER MATTER. SO YOU ARE RECESSED.

ONE THIRTY.

-U.S. Court Reporter-

PLEASE DON'T DISCUSS THE CASE.

(COURT IN RECESS AT 11:55 A.M.)

(LUNCH RECESS)

(JURY OUT OF COURTROOM)

THE COURT: I NEED TO BRING SOMETHING TO THE ATTENTION

OF THE ATTORNEYS. ABOUT FIVE MINUTES AGO, THE JURY TOLD ME
THAT YESTERDAY, IN THE ELEVATOR, A INDIVIDUAL WHO THEY
THOUGHT WAS PART OF MR. COUSINS' FAMILY, AND THEY HAVE
DESCRIBED THE INDIVIDUAL TO ME, KEPT TALKING TO THEM ABOUT
THE CASE, AND WHETHER OR NOT THEY THOUGHT MR. COUSINS WAS
GUILTY OR NOT GUILTY, OR WHAT HAVE YOU.

THEY DESCRIBED IT AS A TALL FELLOW, BLACK HAIR WITH A
WHITE STREAK IN HIS HAIR. I HAVE SEEN HIM IN THE
COURTROOM, WHAT I DO TO HIM IS SOMETHING ELSE.

I NEED TO BRING THAT TO YOUR ATTENTION NOW AND SEE WHAT
WE ARE GOING TO DO ABOUT THIS CASE

AND THIS JURY.

MR. SPROWLS: JUDGE, I DON'T HAVE ANY SUGGESTION OTHER THAN IF THE --

THE COURT: LEFT ME FINISH. I SHOULD HAVE -- THEY TOLD ME THAT THEY DIDN'T -- THAT THEY TOLD HIM THEY COULDN'T TALK ABOUT THE CASE AND HE PERSISTED IN WHATEVER HE TOLD THEM OR ASKED THEM.

I GOT THE IMPRESSION IT DIDN'T AFFECT THEM, BUT THAT IS SOMETHING WE WILL HAVE TO DETERMINE, YOU KNOW, THROUGH SOME QUESTIONING OF WHOEVER WAS IN THAT ELEVATOR.

THE WHOLE JURY PANEL KNOWS ABOUT IT BECAUSE THEY TOLD ME

IN THE PRESENCE OF ALL THE JURORS JUST FIVE MINUTES AGO.

MR. BOOTH: YOUR HONOR, DO WE KNOW THE IDENTITY OF THE INDIVIDUAL?

THE COURT: I JUST DESCRIBED HIM TO YOU. OH, OF THE JUROR?

MR. BOOTH: NO, THE INDIVIDUAL. DOES ANYBODY KNOW THE PERSON'S NAME?

THE COURT: I HAVE SEEN HIM OUT DURING THE TRIAL. A FELLOW TALL, BLACK HAIR WITH A WHITE STREAK IN HIS HAIR. THEY DON'T KNOW WHO HE IS BUT HE HAS BEEN IN THIS COURTROOM A CONSIDERABLE AMOUNT OF THE TRIAL.

MR. BOOTH: I HAVE NO IDEA WHO HE IS, YOUR HONOR, AND THAT IS WHY I WAS ASKING. I THINK

THE FIRST THING WE NEED
TO DO IS TRY TO IDENTIFY THE INDIVIDUAL.

THE COURT: BRING THE JURY IN.

THE COURT REPORTER DID INDICATE THAT THERE HAS BEEN IN
THE COURTROOM OF THAT DESCRIPTION THAT WAS INTRODUCED TO HER
AS MR. COUSINS' NEPHEW. I BELIEVE THAT IT SHOULDN'T BE
HARD, IF HE IS IN ANY WAY RELATED.

(JURY RETURNED TO COURTROOM)

THE COURT: YOU ALL JUST HAVE A SEAT. LET THE RECORD
REFLECT THE JURY PANEL IS ALL HERE.

LADIES AND GENTLEMAN, A FEW MOMENTS AGO YOU TOLD ME
ABOUT AN INCIDENT IN THE ELEVATOR YESTERDAY. I HAVE

RELATED THAT TO THE ATTORNEYS.

FOR PURPOSES OF THIS RECORD, I WISH THAT ONE OF YOU, OR ALL OF YOU, WHOEVER IT WAS, WOULD TELL ME AND THE ATTORNEYS IN THIS RECORD WHAT YOU TOLD ME JUST A FEW MINUTES AGO AND DESCRIBE THE INDIVIDUAL AND THEN I WILLHAVE SOME QUESTIONS FOR YOU.

SO, WHOEVER WANTS TO BE THE SPOKESPERSON? I AM LOOKING AT YOU.

FOURTH JUROR ON FRONT ROW: WE WAS COMING UP IN THE ELEVATOR AFTER LUNCH. A YOUNG BOY THAT HAS BEEN IN THE AUDIENCE COME UP WITH US AND HE WAS ASKING SEVERAL QUESTIONS ABOUT THE TRIAL.

WE TOLD HIM WE COULDN'T TALK

ABOUT IT.

AND HE KEPT PERSISTING. HE SAID, "HE IS GUILTY, ISN'T HE" OR "IS HE GUILTY," OR "IT IS OVER WITH, THEY DON'T HAVE ANY MORE." JUST STATEMENTS LIKE THAT.

EVEN AFTER WE TOLD HIM WE COULDN'T TALK ABOUT IT, HE PERSISTED IN IT, UP UNTIL THE POINT WE PASSED THE DOOR WHERE HE COME IN.

THE COURT: COULD YOU, FOR PURPOSE OF THIS RECORD, DESCRIBE HIM PHYSICALLY AS YOU DID TO ME AS TO HIS APPEARANCE?

JUROR: HE IS THE YOUNG, DARK-HAIRED BOY THAT HAS THE SILVER STREAK IN HIS HAIR THAT HAS BEEN IN ALL THIS.

25. THE COURT: DID HE IDENTIFY HIMSELF TO YOU IN ANY

1 MANNER, WHATSOEVER, AS TO WHO HE WAS OR IF HE HAD ANY

2 RELATION TO THIS CASE WHATSOEVER?

3 JUROR: NO, SIR. NO, SIR.

4 THE COURT: I WOULD LIKE TO ASK THE ENTIRE PANEL

5 SOMETHING.

6 THE EXPERIENCE AS YOU HAVE TOLD ME -- AND IT IS PROPER

7 THAT YOU ALL TELL ME -- I HAVE ASKED YOU TO DO IT AND I

8 THANK YOU. HAS THIS INCIDENT CREATED ANY PROBLEMS IN YOUR

9 MIND THAT WOULD PREVENT YOU FROM PUTTING THAT ASIDE AND

10 PROCEEDING WITH THIS CASE BASING YOUR DECISION ONLY UPON THE

EVIDENCE AND THE LAW AND DISREGARD WHAT WAS SAID TO YOU OR ATTEMPTED TO BE SAID? DOES ANYONE HAVE ANY PROBLEM?

THE JURY COLLECTIVELY: (NEGATIVE RESPONSES).

THE COURT: IS THERE ANYONE AT ALL, NOW, THAT THINKS THAT WOULD INFLUENCE THEM ONE WAY OR THE OTHER IN THIS CASE?

THE JURY: (NO RESPONSE).

THE COURT: ANY -- GOVERNMENT WISH TO ASK ANY QUESTIONS ABOUT THIS OF ANY OF THE JURORS? THIS IS YOUR OPPORTUNITY, ONLY ON THIS INCIDENT.

MR. SPROWLS: NO, SIR.

THE COURT? DEFENSE?

MR. BOOTH: MAY I HAVE JUST ONE MOMENT?

THE COURT: YES, YOU COME UP

HERE AND I WILL ASK THEM.

COME ON UP.

(BENCH CONFERENCE AS FOLLOWS:)

MR. DOUGLASS: WE THINK FROM THE DESCRIPTION, HE IS NOT TALL, BUT WE THINK HIS NAME IS TOMMY COUSINS, HE IS A NEPHEW.

THE THING THAT CONCERNS US IS WHETHER THEY, THE JURY, MIGHT FEEL THAT MR. COUSINS IN SOME WAY, OR THE DEFENSE CONTRIBUTED TO THIS INCIDENT, AND IT MIGHT REACT VERY UNFAVORABLY FOR THE DEFENSE SIDE OF THE CASE, THAT THIS COURT IS CONCERNED AS WELL AS MR. BOOTH AND I.

OBVIOUSLY WE ARE TOTALLY TAKEN

ABACK BY THIS HAPPENING.

THE COURT: THAT IS WHAT I TRIED TO ASK THEM WITHOUT BEING SPECIFIC, WOULD THIS AFFECT THE DEFENDANT'S CASE. BECAUSE I DIDN'T WANT TO BE THAT -- I WAS TRYING TO ASK THEM GENERALLY IF THIS WOULD INFLUENCE THEIR VERDICT ONE WAY OR THE OTHER. I AM OPEN TO A SUGGESTION.

IF YOU WANT ME TO ASK THEM SOME DEFINITIVE QUESTIONS, ON EITHER SIDE, I DON'T WANT TO NOT GIVE MR. COUSINS AN OPPORTUNITY TO FEEL SATISIFIED IN HIS MIND THAT THE JURY IS NOT AFFECTED BY THIS AND I DON'T WANT THE GOVERNMENT TO FEEL THERE HAS BEEN A PROBLEM.

MR. DOUGLASS: I THINK THE THING

WE JUST MENTIONED
21 BRIEFLY WAS IT CONCERNED US.
22 THE COURT: YOU WANT TO TAKE A COUPLE OF MINUTES RECESS
23 AND THEN COME BACK?
24 MR. DOUGLASS: WE MIGHT.
25 THE COURT: COUPLE MINUTE RECESS.

1 MR. SPROWLS: YES, SIR.
2 (END BENCH CONFERENCE)
3 THE COURT: YOU ALL GIVE US ABOUT FIVE MINUTES,
4 PLEASE.
5 (RECESS)
6 THE COURT: BE SEATED.
7 THE COURT: OKAY.
8 MR. SPROWLS: MAY WE APPROACH THE BENCH, YOUR HONOR?
9 THE COURT: SURELY.

(BENCH CONFERENCE AS FOLLOWS:)

MR. BOOTH: YOUR HONOR, DURING THE RECESS, WE HAVE DISCUSSED IT WITH MR. COUSINS TO THE EXTENT WE HAVE BEEN ABLE TO DO IT. MR COUSINS SAYS HE CAN ASSURE US AND HE CAN ASSURE THE COURT THAT HE KNEW NOTHING ABOUT THIS, DID NOT KNOW IT HAPPENED. HE BELIEVES IT MIGHT BE A YOUNG COUSIN OF HIS -- NEPHEW OF HIS WHO'S ABOUT 18 YEARS OF AGE.

BUT HE SAYS THE CONCERN HE HAS, IS WHETHER THE JURY MIGHT THINK HE HAD SOMETHING TO DO WITH THE NEPHEW TALKING AS HE APPARENTLY DID.

HE SAID HE WANTS TO PROCEED WITH THIS JURY BUT HE WOULD LIKE TO KNOW IF THE COURT CAN SAY

THAT HE HAD NO KNOWLEDGE
OR ANYTHING TO DO WITH IT. THAT IS HIS ONLY CONCERN THAT
THE JURORS MIGHT HOLD IT AGAINST HIM.
THE COURT: WHAT WOULD YOU PROPOSE THAT I ASK THIS JURY?
MR. BOOTH: JUDGE, I HAVE NEVER BEEN IN THIS KIND OF

SITUATION BEFORE.
THE COURT: WELL, I AM PLOWING NEW GROUND MYSELF.
MR. DOUGLASS: WOULD IT BE APPROPRIATE TO ADVISE THEM
THAT MR. COUSINS HAS STATED THAT HE KNEW NOTHING ABOUT IT?
THE COURT: I DON'T THINK SO.
MR. DOUGLASS: I THINK THAT IS THE REAL CONCERN, THAT
SOME WAY OR ANOTHER THEY WILL THINK

COUSINS --

THE COURT: THEY SAID THEY DON'T -- THE MAN DIDN'T IDENTIFY HIMSELF AS BEING RELATED.

MR. DOUGLASS: I AM NOT SURE WHAT THE QUESTION OR ANSWER WAS. THERE WAS NO IDENTIFICATION EXCEPT A PHYSICAL ONE.

MR. BOOTH: IT IS HARD TO SPECULATE ON HOW THEY MIGHT REACT.

THE COURT: I CAN JUST GO BY WHAT THEY TOLD ME. THEY SEEMED TO BE A PRETTY UP-FRONT JURY.

MR. BOOTH: I THINK THEY ARE, JUDGE. I AM SURE THEY ARE FORTHRIGHT AND FRANK IN THEIR EXPRESSIONS.

BUT IT IS MY ONLY CONCERN IS WHETHER THEY MIGHT TRY TO

HOLD IT AGAINST HIM, AND I WAS LOOKING FOR A WAY AND TRYING TO SEE IF THERE WAS ANY WAY THE COURT WOULD SATISFY ITSELF THAT HE HAD NOTHING TO DO WITH IT.

THE COURT: I DON'T HAVE ANY OBJECTION, IF YOU FEEL IT IS NECESSARY TO TELL THEM THAT. THEY TOLD ME THIS WOULD NOT COLOR THEIR VERDICT, AND IT SHOULD NOT ENTER INTO ANY

CONSIDERATION WHATSOEVER IN THEIR DELIBERATIONS. I HAVE TOLD THEM THAT. I DON'T KNOW WHAT MORE I CAN TELL THEM.

I AM NOT GOING TO TELL THEM MR. COUSINS TOLD ME HE DIDN'T HAVE ANYTHING TO DO WITH IT OR I SAY HE DOESN'T HAVE

ANYTHING TO DO WITH IT. I JUST DON'T THINK I CAN DO THAT.

MR. BOOTH: WHAT ABOUT, JUDGE, MAYBE JUST APPROACHING IT DO THEY FEEL THEY WOULD NOT HOLD ANYTHING AGAINST MR. COUSINS?

MR. DOUGLASS: BUT THAT IS INDICATING HE MIGHT HAVE SOMETHING TO DO WITH IT.

MR. SPROWLS: THAT IS FINGERING HIM.

THE COURT: I AM TRYING TO BE EVEN-HANDED ABOUT THIS THING A MOMENT AGO. LIKE I SAID, I HAVEN'T BEEN IN IT EITHER, BEFORE, MR. BOOTH, SO WE ARE BOTH SORT OF TRYING TO FIND THE RIGHT ANSWERS HERE. I DON'T WANT TO LOSE THIS JURY AND THIS CASE IN THE SENSE THAT

WE HAVE ALREADY

17 INVESTED A LOT OF TIME AND EFFORT IN IT.

18 MR. BOOTH: WE DON'T EITHER.

19 THE COURT: I DON'T FEEL THIS WOULD PREJUDICE MR.

20 COUSINS AT ALL. IF I DID, I WOULD GO AHEAD AND MISTRY.

21 I DON'T FEEL AS THE JURY AS RESPONDED -- I THOUGHT NUMBER

22 ONE, THEY WERE UP FRONT ABOUT TELLING US; AND SECONDLY, THEY

23 INDICATED TO US IN OPEN COURT THAT THIS WOULD NOT AFFECT

24 THEIR VERDICT IN ANY WAY.

25 AND I AM INCLINED TO REALLY ACCEPT THAT, BECAUSE THEY

1 ARE A HARD -- THEY HAVE BEEN A HARD-WORKING, AT LEAST IT

APPEARS TO BE A HARD-WORKING ENERGETIC GROUP.

MR. BOOTH: VERY ATTENTIVE.

THE COURT: YES, I THINK SO, TOO.

MR. DOUGLASS: ONE THING I WOULD ASSUME, SOME OF THIS WAS SAID IN OPEN COURT THAT THE NEWSPAPER IS GOING TO PUBLISH.

THE COURT: OH, SURE.

MR. DOUGLASS: AND I KNOW WE HAVE INSTRUCTED THEM NOT TO READ THE NEWSPAPER AND ALL THIS. AND I FEEL LIKE PROBABLY WHAT IS GOING TO COME OUT IN THE NEWSPAPER IS SOMETHING LIKE COUSINS NEPHEW TRYS TO INFLUENCE JURY. AND IF THEY ARE, THEN WE ARE GOING TO HAVE A PROBLEM OF A

COMMUNITY SITUATION.

THE COURT: I CAN HANDLE MY JURY, AS I TRY TO DO EVERYDAY AND TELL THEM NOT TO READ ANYTHING.

MR. DOUGLASS: I AM THINKING OF IN TERMS OF IF IT GETS TO BE A BIG DEAL.

THE COURT: I UNDERSTAND

MR. DOUGLASS: I KNOW WE CAN'T CONTROL THOSE THINGS, BUT THAT IS ONE OF THE CONCERNS.

THE COURT: I FEEL CONFIDENT THE NEWS ABOUT THIS TRIAL TOMORROW, THERE WILL BE SOMETHING ABOUT THIS IN THE HEADLINES ABOUT WHAT WENT ON IN THE TRIAL.

MR. DOUGLASS: SUPPOSE WE SAY MR. COUSINS HAD NOTHING

TO DO WITH IT TO THE PRESS IF WE ARE QUESTIONED?

I CERTAINLY WANT TO PROTECT MY CLIENT'S RIGHT TO A FAIR TRIAL, BUT THE COMMUNITY REACTION AND PRESSURE PUT ON THE JURY --

THE COURT: I REALLY HATE FOR YOU TO START TALKING ABOUT ANY OF THESE THINGS TO THE PRESS.

MR. DOUGLASS: WE HAVEN'T.

THE COURT: I UNDERSTAND.

MR. DOUGLASS: BUT THIS MIGHT BE A SITUATION WHERE WE ARE MORE OR LESS OBLIGATED -- IF HE RESPONDS -- IF THE IMPLICATION IS OUR CLIENT DID IT.

MR. SPROWLS: YOU ARE ASSUMING HE DID. NOW THE FACT

THAT A FAMILY MEMBER MAY HAVE DONE IT, IF IT IS, IN FACT, A FAMILY MEMBER.

MR. DOUGLASS: THE POINT IS, WE ALL KNOW HE DIDN'T HAVE ANYTHING TO DO WITH IT, BUT WHAT I AM TALKING ABOUT IS THE WAY THEY PUT IT IN THE PAPER MAY NOT.

THE COURT: SEE, THEY ARE NOT TRYING THE CASE. WE HAVE FOURTEEN PEOPLE HERE, NUMBER ONE THEY BROUGHT IT TO OUR ATTENTION. AND NUMBER TWO, THEY SAID IT WON'T AFFECT THEM.

NOW IF IT AFFECTS THE MAN ON THE STREET, THAT IS SOMETHING ELSE, I CAN'T HANDLE THAT.

MR. BOOTH: JUDGE, AS FAR AS MR. COUSINS IS CONCERNED, WE HAVE INSTRUCTED HIM NOT TO EVEN RIDE THE ELEVATOR, IF

ANYBODY IS EVEN CLOSE TO HIM, AND IF ANY OF HIS FAMILY IS

THERE. WE HAVE TRIED TO BE A GUARDED ABOUT THAT AS WE POSSIBLY CAN.

WE WON'T EVEN RIDE AN ELEVATOR DOWN WITH ANYBODY.

THE COURT: I UNDERSTAND.

MR. BOOTH: WOULD IT BE APPROPRIATE TO SAY IN OPEN COURT NOW, WE HAVE BROUGHT THIS TO MR. COUSINS' ATTENTION AND HE HAS ASSURED US THAT HE HAD NO KNOWLEDGE OF IT AND HAD ABSOLUTELY NOTHING TO DO WITH IT, AND IF HE HAS --

MR. DOUGLASS: LET US STATE THAT YOU IN OPEN COURT WITH THE JURY PRESENT.

MR. SPROWLS: WELL, THEN THEY ARE GOING TO LOOK AT ME AND SAY WAS IT YOU?

MR. DOUGLASS: THEN LET THE GOVERNMENT --

THE COURT: I AM NOT GOING TO DO THAT. I AM THROUGH WITH THIS JURY ON THIS ISSUE UNLESS THERE IS SOME QUESTION THAT YOU WANT ME TO ASK THEM SPECIFICALLY ON THIS, BECAUSE I AM SATISFIED WITH THEIR REPLIES THUS FAR.

MR. BOOTH: I COULDN'T GET A FULL DRIFT OF WHAT WAS SAID. IS IT SOMETHING ABOUT, IS HE GUILTY?

THE COURT: READ IT BACK -- IT WENT BOTH WAYS.

MR. BOOTH: IS HE GUILTY OR NOT?

THE COURT: GUILTY, NOT GUILTY,

IT IS ALL OVER, YOU ARE
THROUGH OR SOMETHING...
(THE CONVERSATION WAS READ TO COUNSEL BY THE REPORTER)
MR. BOOTH: THAT IS SAYING, HE IS GUILTY, ISN'T HE?

THAT IS A TWO EDGE SWORD ISN'T IT?
THE COURT: IT SAID IS HE GUILTY OR IS HE NOT GUILTY
AND ASKED THEM, IT IS OVER WITH, ISN'T IT?
WHAT DO YOU WANT ME TO ASK THEM?
MR. BOOTH: JUDGE, I AM LOST. I REALLY AM. I JUST
REALLY DON'T KNOW WHAT TO DO ABOUT IT. I THINK WEE NEED ONE
MORE MINUTE TO TELL OUR CLIENT THAT YOU FEEL YOU HAVE GIVEN
THE JURY PROPER INQUIRY.

THE COURT: YOU TELL HIM I AM STILL AMENABLE IF YOU HAVE ANY SPECIFIC QUESTIONS. I AM NOT GOING TO MAKE A STATEMENT TO THEM THAT HE SAID HE HAD NOTHING TO DO WITH IT.

BUT ANY QUESTIONS THAT YOU CAN THINK OF THAT WOULD GO TO ASSURE YOU OR REASSURE YOU OR YOUR CLIENT THAT THIS HAS NOT AFFECTED THIS JURY, AND THEY ARE PREPARED TO PROCEED WITHOUT THIS ENTERING INTO THEIR DELIBERATIONS, OKAY?

MR. BOOTH: JUST ONE SECOND.

THE COURT: SURE.

(BRIEF PAUSE FOR DEFENDANT'S COUNSEL TO TALK TO THEIR CLIENT)

MR. DOUGLASS: JUDGE, THE DEFENDANT FEELS THAT THE

DIRECT QUESTION SHOULD BE ASKED OF THE JURY, IF ANY OF THE JURORS FEEL THAT WHETHER OR NOT, THAT HE HAD SOMETHING TO DO WITH IT, AND IF THEY DO, IF THAT WOULD AFFECT THEIR CONSIDERATION.

HE ALSO, WE DISCUSSED THIS AT LENGTH WHILE WE WERE

THERE.

WE ASKED HIM ABOUT, WHETHER OR NOT HE WANTED TO DIRECT US TO MAKE A MOTION FOR A MISTRIAL, AND HE WOULD LIKE TO MAKE THAT DECISION THIS AFTERNOON AFTER WE GO ON UNTIL HE HAS A OPPORTUNITY TO REFLECT ON IT, WITH OTHER THAN WHAT WE JUST TOLD YOU.

FOR YOUR INFORMATION, OUR OWN VIEW IS THAT WE ARE A LITTLE BIT CONCERNED WE MIGHT BE INFLUENCED BY OUR OWN APPROACH TO THIS BECAUSE WE DON'T WANT TO HAVE TO DO THIS ALL OVER AGAIN, AND WE ARE HESITANT TO TELL HIM, YOU KNOW, YOU DON'T DO THIS OR DON'T DO THAT IN THIS CASE, BUT IT IS HIS DECISION NOW ABOUT WHETHER HE FEELS LIKE HE IS GETTING A FAIR TRIAL.

THAT IS ABOUT THE SUM OF WHAT WE WERE ABLE TO COME UP WITH. UNLESS YOU HAVE SOMETHING TO ADD TO THAT.

MR. BOOTH: NO, I THINK HIS BASIC CONCERN IS WHETHER OR NOT THEY WILL TRY TO HOLD IT AGAINST HIM, AND HE THOUGHT ONE

OF THE JURORS CONVEYED THE IMPRESSION THAT SHE MIGHT THINK HE DID IT.

MR. BOOTH: HE SAID HE JUST GOT A REACTION FROM ONE OF THE JURORS WHEN THE QUESTION WAS ASKED.

MR. DOUGLASS: BY YOU?

MR. SPROWLS: HOW CAN ONE GET THAT ACROSS?

MR. BOOTH: HE DOESN'T WANT...

THE COURT: WHEN YOU ARE ON TRIAL, YOU CAN GET A LOT OF

IMPRESSIONS.

MR. SPROWLS: THEY ARE NOT ALL ACCURATE, THOUGH.

MR. DOUGLASS: THAT IS NOT REALLY THE POINT.

MR. BOOTH: JUDGE, HIS POSITION

IS HE DOESN'T WANT A
MISTRIAL, HE WANTS TO PROCEED WITH THE TRIAL BUT HE HAS A
CONCERN THAT THE JURY MIGHT TRY TO HOLD IT AGAINST HIM AND
FEEL HE MIGHT HAVE SOMETHING TO DO WITH SOMEBODY, IF THIS
WAS A MEMBER OF HIS FAMILY TRYING TO TALK TO THEM. AND THAT
IS HIS CHIEF CONCERN AND I THINK IT IS A LEGITIMATE ONE WE
SHARE.

THE COURT: I DON'T HAVE ANY QUARREL WITH THAT. THAT
IS WHAT I THOUGHT MY QUESTIONS WERE DESIGNED TO ELICIT AND
THEY HAVE TOLD ME THAT THIS WOULD NOT INFLUENCE THEIR
DECISION ONE WAY OR THE OTHER.

MR. BOOTH: JUDGE, WOULD IT BE APPROPRIATE TO BRING

THEM BACK AND SAY WE WANT TO BE SATISFIED THAT THIS EXPERIENCE YOU HAD IN NO WAY WILL INFLUENCE YOU AGAINST MR. COUSINS -- FOR OR AGAINST MR. COUSINS OR FOR OR AGAINST THE GOVERNMENT? ISN'T THAT WHAT WAS JUST ASKED?

THE COURT: YES, BUT I CAN ASK IT AGAIN IF THAT WILL SATISFY HIM.

MR. DOUGLASS: I AM NOT SURE THAT IS THE QUESTION HE WANTED TO ASK.

MR. BOOTH: JUDGE, IS THE COURT NOT INCLINED TO ASK THE SPECIFIC QUESTION HE WANTS THAT DEXTER GAVE A MINUTE AGO?

MR. DOUGLASS: DID THE JURY

THINK HE HAD ANYTHING TO DO WITH IT?

MR. SPROWLS: IF YOU ARE GOING TO DO ONE -- FOR ONE, YOU HAVE TO DO ONE FOR THE OTHER, AND I THINK IT LENDS WHERE THE JURY HAVEN'T ANY FEELING IT ORIGINATED FROM EITHER SIDE. NOW THAT YOU THINK THAT MAYBE ONE SIDE DID HAVE SOMETHING TO DO WITH IT.

IF YOU DIRECT IT TO -- THEY DON'T KNOW WHO THIS PERSON IS, AND IF YOU SAY, YOU WILL NOT HOLD IT AGAINST THE DEFENDANT, AND WILL YOU NOT BE ABLE TO HOLD IT AGAINST THE GOVERNMENT? IT ALMOST IMPLIES ONE OF US WAS INVOLVED, AND THAT IS NOT ACCURATE, AND THAT IS THE PROBLEM I HAVE WITH

EVEN HIGHLIGHTING THIS THING.

THE GOVERNMENT HAS NO PROBLEM WITH REASKING THE SAME QUESTION AND BE SURE EVERYBODY IS DEAD SERIOUS AND THEY COULD CONTINUE THAT IT DID NOT HAVE AN EFFECT ON THEIR DECISION ONE WAY OR THE OTHER.

MR. BOOTH: WHAT ABOUT PUT THE QUESTION TO THEM DO ANY OF YOU FEEL MR. COUSINS OR THE GOVERNMENT HAD ANYTHING TO DO WITH THIS. IF SO, WILL YOU SPEAK UP.

MR. SPROWLS: I DON'T THINK THAT IS A FAIR THING TO PUT TO THEM.

MR. BOOTH: WE HAVE GOT TO KNOW. WE GOT TO KNOW THAT KIND OF REACTION, I THINK.

THE COURT: ANYTHING ELSE?

COURT REPORTER: YOU COULD POLL THEM INDIVIDUALLY.

MR. DOUGLASS: I HATE TO SAY THAT MAYBE SOMEBODY THAT WASN'T INVOLVED BROUGHT UP A GOOD POINT, BUT WOULD IT BE APPROPRIATE TO AGREE TO YOUR QUESTIONING OF THE JURORS INDIVIDUALLY?

YOU DOING IT OUTSIDE OUR PRESENCE?

THE COURT: ANYTHING ELSE?

MR. SPROWLS: NO, SIR.

THE COURT: I AM GOING. I'LL BE BACK IN ABOUT FIVE MINUTES.

(RECESS)

THE COURT: YOU ALL COME UP.

(BENCH CONFERENCE CONTINUED)

THE COURT: I WILL ASK THE JURY

THE FOLLOWING TWO QUESTIONS.

"DO ANY OF YOU FEEL THAT THE INCIDENT YOU HAVE DESCRIBED WAS PROMPTED OR INSTIGATED BY EITHER THE GOVERNMENT OR DEFENDANT?"

THE SECOND, "WILL IT IN ANY MANNER ENTER INTO OR AFFECT YOUR CONSIDERATION OF THE MERITS OF THIS CASE?"

MR. BOOTH: THAT IS FINE.

MR. DOUGLASS: YES.

MR. BOOTH: THANK YOU. ALL RIGHT.

(END BENCH CONFERENCE)

(JURY RETURNED TO COURTROOM)

-U.S. Court Reporter-

THE COURT: JUST HAVE A SEAT, FOLKS.

I JUST HAVE TWO MORE QUESTIONS CONCERNING THE INCIDENT YOU DESCRIBED.

DO ANY OF YOU, AT THIS TIME, FEEL THAT THE INCIDENT YOU HAVE DESCRIBED AND TOLD US IN OPEN COURT WAS PROMPTED OR INSTIGATED BY EITHER THE GOVERNMENT OR THE DEFENDANT. ANY OF YOU FEEL THAT WAY?

JURY COLLECTIVELY: NO.

THE COURT: SECONDLY, WILL THE INCIDENT IN ANY MANNER ENTER INTO OR AFFECT YOUR CONSIDERATION OF THE MERITS OF THIS CASE?

JURY COLLECTIVELY: NO.

THE COURT: THANK YOU.

WE ARE READY TO PROCEED.

CALL YOUR NEXT WITNESS.

TRIAL TRANSCRIPT, OF DEC. 4, 1986
PAGE 1, LINE 1 THROUGH PAGE 4, LINE
22, AND PAGE 6, LINE 21 THROUGH PAGE 7,
LINE 10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,)
)
PLAINTIFF,)
GCR 86-00013
)
VS.)
DECEMBER 4, 1987 (SIC))

WILLIAM PATRICK COUSINS,)
)
DEFENDANT.)
GAINESVILLE, FLORIDA

JURY TRIAL
BEFORE THE HONORABLE MAURICE M. PAUL

APPEARANCES:
FOR THE PLAINTIFF:
P. ALAN SPROWLS, ESQUIRE
ASSISTANT UNITED STATES ATTORNEY
227 NORTH BRONOUGH STREET
TALLAHASSEE, FLORIDA 32301

FOR THE DEFENDANT:
W. DEXTER DOUGLASS, ESQUIRE
AND
EDWARD BOOTH, ESQUIRE
311 EAST CALL STREET
TALLAHASSEE, FLORIDA 32301

(SIC-error in trial transcript)

-TRANSCRIPT PRODUCED BY COMPUTER SHORTHAND-

R. DARLENE PINO, CSR, RPR
OFFICIAL UNITED STATES COURT REPORTER
110 EAST PARK AVENUE
TALLAHASSEE, FLORIDA 32301
TELEPHONE (904) 681-6008

THE COURT: MR. DOUGLASS?

MR. DOUGLASS: SIR, WOULD YOU LIKE FOR US TO APPROACH THE BENCH ON THIS?

THE COURT: I DON'T KNOW WHAT YOU HAVE IN MIND. JUST STATE IT.

MR. DOUGLASS: WE WOULD LIKE TO MOVE THE COURT FOR ENTRY OF AN ORDER DECLARING A MISTRIAL IN CONNECTION WITH THE MATTER THAT OCCURRED WITH THE JURY YESTERDAY.

WE, OVER THE EVENING, WE COMTEMPLATED ON THIS MATTER, WE

HAD DISCUSSIONS WITH OUR CLIENT, AND WE CONCLUDED THAT UNDER THE CIRCUMSTANCES HERE, THAT WE, AND OUR CLIENT, FEEL THAT IT WOULD NOT BE POSSIBLE FOR US TO RECEIVE A FAIR TRIAL UNDER THE CIRCUMSTANCES.

REINFORCING THAT DECISION, WHICH WAS MADE LAST NIGHT, WE FELT THE NEWSPAPER ARTICLE THIS MORNING WAS AN ADDITIONAL CONSIDERATION, THOUGH IT WAS NOT THE SOLE CONSIDERATION OF ALL.

THIS IS A MOTION THAT WE WERE RELUCTANT TO MAKE. I THINK THE COURT IS AWARE OF THAT. BUT WE DO FEEL, UNDER THE CIRCUMSTANCES, WE JUST COLLECTIVELY CONCLUDED THAT WE WOULD HAVE TO ASK THE COURT FOR A MISTRIAL,

BECAUSE WE JUST DON'T
22 FEEL THAT IT WOULD BE POSSIBLE AT THIS TIME, WITH THIS JURY,
23 UNDER THESE CIRCUMSTANCES, TO OBTAIN A FAIR TRIAL.
24 WE WOULD LIKE TO OFFER INTO THE RECORD THE NEWSPAPER
25 ARTICLE, FOR WHATEVER VALUE IT IS, YOUR HONOR.

-U.S. COURT REPORTER-

1 WHILE THE DEFENDANT -- WELL, I THINK I HAVE STATED OUR
2 POSITION. I COULD STATE IT MORE. MAYBE MR. BOOTH COULD ADD
3 SOME TO IT.
4 MR. BOOTH: JUDGE, I WOULD JUST BRIEFLY ADD THAT THE
5 NEWSPAPER ARTICLE IDENTIFIES THE PERSON THAT APPARENTLY
6 APPROACHED ONE OF THE JURORS AS THE

NEPHEW OF THE DEFENDANT,
AND THE NEWSPAPER ARTICLE, OF COURSE, JUST SAYS THAT THE
COMMENT WAS MADE, "HE'S GUILTY, ISN'T HE?" IF THAT REMARK
WAS MADE, AND COMING FROM A MEMBER OF HIS FAMILY, I THINK
THE PREJUDICIAL EFFECT OF THAT IS JUST SOMETHING TOO
DIFFICULT TO OVERCOME.

AS MR. DOUGLASS SAID, WE ARE VERY RELUCTANT TO MOVE FOR
A MISTRIAL, BUT OUR CLIENT FEELS VERY STRONGLY ABOUT IT. HE
STATED HE VIEW ABOUT BEING UNABLE TO OBTAIN A FAIR TRIAL
UNDER THIS JURY, AND WE FELT WE HAD NO ALTERNATIVE.

THE COURT: GOVERNMENT WISH TO RESPOND?

MR. SPROWLS: AS FAR AS THE

ARTICLE, PER SE, IT WAS NOT
ON THE FRONT PAGE, IF I UNDERSTAND CORRECTLY, WHERE IT WAS
POSITIONED. THE GENERAL ADMONISHMENT IS THE JURY IS NOT
SUPPOSED TO BE LOOKING AT THESE THINGS OR LOOK AT THE PAPER,
SO I ASSUME THEY ARE LIVING UP TO THEIR DUTY.

JUDGE, I CAN'T REALLY OFFER ANY MORE COMMENT ON THE
REASONS. I HAVE TO LEAVE THAT TO YOUR DISCRETION, SIR.

THE COURT: WELL, I AM SATISFIED FROM THE QUESTIONS AND
ANSWERS FROM THIS JURY, THAT THE INCIDENT IS NOT GOING TO

AFFECT THEM WHATSOEVER IN THEIR DELIBERATIONS. I HAVE ASKED

THEM QUESTIONS THAT BOTH SIDES WANTED ASKED. THEY RESPONDED TO THE QUESTIONS TRUTHFULLY, I FEEL.

IT WOULD BE INAPPROPRIATE TO GRANT A MISTRIAL. I DENY THAT MOTION. WE'RE GOING TO PROCEED ON.

MR. BOOTH: YOUR HONOR, MAY WE APPROACH THE BENCH ON ONE MATTER FOR ONE SECOND?

THE COURT: YES.

(BENCH CONFERENCE AS FOLLOWS:)

MR. BOOTH: JUDGE, I WANTED TO ADVISE THE COURT THIS MORNING, ABOUT 8:00, I RECEIVED A TELEPHONE CALL FROM MR. JOHN COUSINS, WHO ASKED ME, IN ESSENCE, SHOULD HE BRING HIS SON TO THE COURTHOUSE OR SHOULD HIS SON COME TO THE COURTHOUSE OR WHAT SHOULD HE DO. I

TOLD HIM I WOULD NOT
TALK TO HIS SON, AND I DID NOT. I TOLD HIM TO CALL ME BACK
ABOUT 8:30 THIS MORNING.
WE LEFT THE OFFICE WHERE WE WERE BEFORE 8:30, AND LEFT
WORD THAT IF HE CALLED, TO HAVE HIM COMMUNICATE DIRECTLY
WITH THE COURT.
THE COURT: I DON'T WANT ANY COMMUNICATION. ANYTHING
THAT IS GOING TO BE DONE ABOUT THAT INCIDENT, I WILL TAKE
CARE OF IT AT THE APPROPRIATE TIME.

MR. DOUGLASS: JUDGE, WHILE WE ARE HERE, AND THIS WILL
BE THE LAST TIME, I TAKE IT THERE WOULD BE NO
RECONSIDERATION ON THE PREVIOUS

MOTION AT ANYTIME?

24 THE COURT: WHAT PREVIOUS MOTION?

25 MR. DOUGLASS: THE MOTION FOR MISTRIAL ON THE JURY

1 MATTER?

2 THE COURT: YOU CAN ALWAYS BRING UP MATTERS.

3 MR. DOUGLASS: WE FEEL VERY STRONGLY ON THE MOTION. I

4 THINK YOU ARE AWARE OF THAT.

5 THE COURT: UNLESS YOU HAVE SOMETHING NEW, I WOULDN'T

6 BRING IT UP AGAIN. YOU HAVE PROTECTED YOUR RECORD. IF YOU

7 HAVE SOMETHING ADDITIONAL, I WILL ALWAYS BE GLAD TO HEAR IT.

8 (END BENCH CONFERENCE)

9 THE COURT: BRING IN THE JURY,

PLEASE, MA'AM.

(JURY RETURNED TO COURTROOM)

CHRONOLOGY OF MEDIA EVENTS
AND EXTRINSIC EVIDENCE JURY CONTACT

CHRONOLOGICAL CHART--PARTIAL of key days of media coverage before and during, excluding TV and radio daily, the trial.

April 18, 1986 Headlines, COUSINS INDICTED-DRUGS Tax Evasion, 45 years in prison.

May 5, 1986 Arraignment

June 3, 1986 Cousins in comtempt...

June 5, 1986 Pot residue...

June 13, 1986

June 19, 1986 Cousins launders large amounts of cash...

July 21, 1986 Judge delays Cousins...

July 29, 1986 Cousins told to reveal taxes...

August through October The editorials, news continues...

November 17, 1986 Headlines first

day of trial...

(Daily coverage of trial...and beyond. Daily summaries of witnesses. Pilot describes plan... Four confessed drug SMUGGLERS... LAUNDERING of thousands of tax dollars...Expenses exceeded income...two SMUGGLERS tell of Cousins ties...SCAM on taxes...SMUGGLER, Frank Brady testifies against Cousins...

December 4, 1986 Headlines:

20 inches x 1 1/4 high in dual vending boxes at Courthouse entrance.

COUSINS' NEPHEW QUIZZES JURORS

Nephew of Cousins tries to quiz jury in recess. COUSINS CASE NEARLY DECLARED MISTRIAL. Man talks to jurors...JURORS said a member of Cousins family...Court Reporter says nephew.

December 12, 1986 Cousins calls

himself an 'ANTI-DRUG PERSON'

December 13, 1986 Cousins denies ties...

December 14, 1986 Three prosecution witnesses say Cousins' reputation poor, one heroin addict housekeeper saw drugs in Cousins' bathroom.

December 16, 1986 Final arguments set today...

Jury deliberations..

DIAGRAM OF COURTROOM,
ELEVATORS, AND JURY ROOM

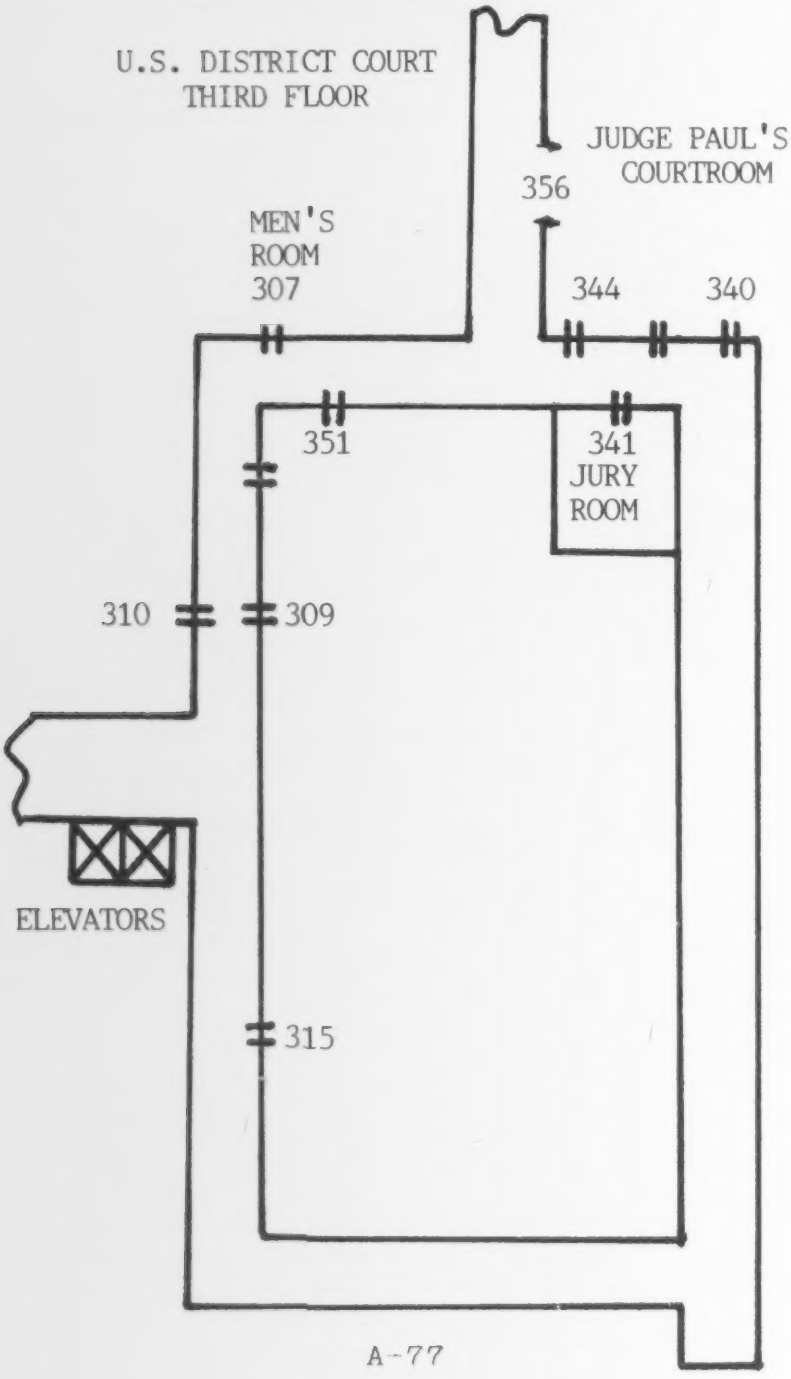
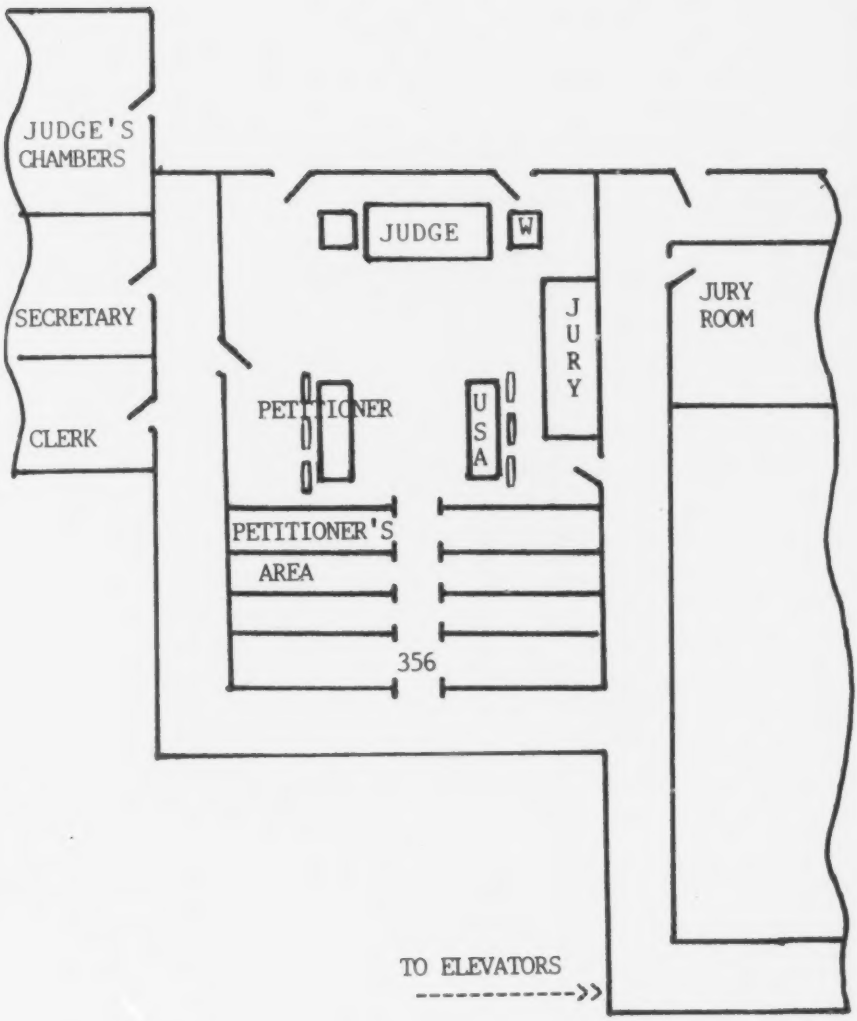


DIAGRAM OF JUDGE'S CHAMBERS SECRETARY, CLERK, JURY ROOM, HALLWAYS AND CORRIDORS



COUSINS'S JURY HEADLINES
REGARDING NEPHEW IN TWO
NEWSPAPER DISPENSERS
HEADLINES TWICE

"COUSINS' NEPHEW QUERRIES JURY' in both boxes.

The entrance all fourteen jurors must enter and exit four times each and every day. They must walk by the two newspaper dispensers of the Gainesville Sun, a New York Times Paper. They must walk from the parking lot across the street into this

entrance to the elevator and up to their courtroom on the 3rd floor. These two newspaper vending machines heralded:

COUSINS' NEPHEW QUERRIES JURY

as HEADLINES clearly shown in TWO dispensers.

AFFIDAVIT/STATEMENT OF TOMMY COUSINS

My name is Tommy Cousins. My uncle is William Patrick Cousins. I am 19 years old. On December 2, 1986, I was with my Grandmother and five or six jurors and other passengers in an elevator at the Federal courthouse in Gainesville, Florida. I talked with them down the hall. I said things to them, I now realize I should not not have said. What I said to them was taken as admissions of his guilt ...as though coming from inside the family. I am sure they know who I was. I had seen them every day for five days. They took what I said as admissions of my uncle's guilt. And from a family member who should know. I certainly learned a lot, especially after I was sentenced to three years. I will never talk to a jury again. I have read this

statement of one page and it is true and correct. Additionally, I would like to add that my best guess is I talked to the jury for 90 seconds and over 200 words. I have read the above statement of one page and it is true and correct under oath.

(Signed)_____

(Tommy Cousins)

AFFIDAVIT/STATEMENT OF
FRAN COUSINS

My name is Fran Cousins. I am 72 years old. On December 2, 1986, after lunch and the morning court session of Mr. Cousins, I was returning to the courtroom with my nephew, Tommy Cousins. We entered an elevator with 5-6 jurors I knew and recognized. I stood in one corner and Tommy in the corner. The elevator was full. He spoke many, many words. My best guess would be over 200 plus words as he talks rapidly once he gets started. He talked with them in the hallways on the third fllor after we got off the elevator. He used the word "guilty" 3 or 4 times. I could hear everything he said. My nephew said about my son, "He's guilty." "It's over with!" "There's no more to come!" "It's enough, isn't it?" My nephew was

excited, upset, nervous about the evidence he was hearing. He was talking like an insider in the family. He loves his uncle. He was only trying to be helpful and had not evil intention. The jurors were annoyed and irritated by what he said and his persistence. He followed them down the hall, talking with them. I have read the above statement of one page and it is true and correct under oath.

(Signed_____

(Fran Cousins)

JUDGE PAUL'S JURY QUESTIONAIRES

Judge Paul had fifty jurors fill out his jury questionaires at 10:00 A.M. on the first day of trial and permitted Petitioner's counsel to see these questionaires for 15-20 minutes at 2:00 P.M. and then insisted counsel return the questionaires to the bench. The jury was completely selected by 4:00 P.M. on the first day of trial with much of the day taken up with other motions. Counsel for Petitioner had no opportunity to inquire regarding the nature or extent of any media contact by the jury. I think Judge Paul's inquiries were taped, but there was no court reporter present to record voir dire or the jury selection process. It was not part, of course, of the record in the Appelate Court.

These questionaires were 30 pages of questions; one third of these pages were

questions of media potential influence, both print and electronic. Judge Paul has forbidden access or review of these records.

Judge Paul, for the second time in his career as Judge, used "Questionaires" in his jury selection. These questionaires had the effect of not making public the juries media history and contact with the media, where Cousins was and is the local celebrity. Cousins was one of the five most newsworthy persons in this area, similar to: Victor Posner, Dr. Sheppard, and Billie Sol Estes. And Judge Paul has held secret these questionaires. As he did in the only other case he used them, i.e. Mallory Horne, the Speaker of the House and of the Florida Senate. Judge Paul has not made these questionaires part of the record, nor has he given the Petitioner the right to know

the nature and extent of the jury contact with the media. These questionaires have the effect of selecting a jury behind closed doors, a Star Chamber in the eighties. Thus, depriving the Petitioner his presence, "at every stage of the (his) trial." A very crucial and significant stage for the most newsworthy person in his area.

ERRORS IN U.S. v. COUSINS

U.S. v. Cousins, page 2488, in note 6, (A-17) we read that, "the jurors expressly denied this fact," referring to the nephew as part of Cousins family. Judge Paul limited his questions to whether or not the nephew SAID who he was or identified himself. The jury knew who he was. He was with his Grandmother who was also Mr. Cousins' mother and they had sat in the trial for five days in the Petitioner's area. (See A-65)

Further, the jury was aware of who the nephew was at the time of the interrogation. And had full knowledge of his identity. Judge Paul never asked that question. So when the Court of Appeals stated "jurors denied any knowledge", they are clearly in error on a very crucial point. The next day when they passed the "headlines" COUSINS NEPHEW QUERRIES JURY

42 time, at 9:00 A.M., 12:00 P.M., and 1:30 P.M., on their entry and exit to the courthouse they had it staring in their face in duplicate. (See A-64)

Not only did the jury know who he was, they saw the headlines and a newspaper was found in the jury room creased to the article and a juror was seen by Petitioner and a clerk/bailiff carrying the paper into the jury room.

Thus, in the Court of Appeal's opinion, the three crucial sentences on page 2488, (A-16), section 2, (A-17), on which the entire opinion is based is in error. If the statements are reversed, which is the fact, the opinion should be reversed. 1) The nephew did prompt the incident, in fact was the incident; 2) The entire jury had full knowledge of the incident; 3) It did effect and affect their consideration and deliberations.

Judge Paul never asked the effect or affect question adequately or properly.

If the transcript is read carefully or better, exegetically, one can begin to understand the improper use of privilege and power by Judge Paul. I think it very significant that he, Judge Paul, got a NO RESPONSE after his first try and preparation..-a clear violation of Rule 43(a). He should have used the available court reporter, as the judge did in U.S. v. Gypsum, 438 U.S. 422 (1978). That case was reversed, even though, that judge did put the "talk" with a juror on the record and did have permission of counsel not to be present.